IN THE

Supreme Court of the United States

DOCKET NO.

78-1239

MARSHALL P. SAFIR,

Petitioner,

vs.

ROBERT W. BLACKWELL, Individually and as Assistant Secretary of Commerce, AMERICAN EXPORT LINES, LYKES BROS. S.S. CO. INC., AMERICAN PRESIDENT LINES, FARRELL LINES INC., PRUDENTIAL LINES INC., P.S.S. STEAMSHIP CO. INC., UNITED STATES LINES INC., MOORE McCORMACK LINES INC.,

Respondents.

Petition for Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

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TABLE OF CONTENTS

CASES CITED:

TABLE OF CONTENTS

CASES CITED:

TABLE OF CONTENTS

CASES CITED:

TABLE OF CONTENTS

CASES CITED:

TABLE OF CONTENTS

CASES CITED:

CODES CITED:

TABLE OF CONTENTS

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Petitioner prays that a Writ of Certiorari issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 27, 1978, (appendix page 15a) and affirmed on November 28, 1978 denying rehearing *en banc* (App. p. 7a).

SAFIR V.

OPINIONS BELOW

SAFIR I.

Safir v. Gibson, 417 F.2d 972 (2nd Cir. 1969).

SAFIR II.

Safir v. Gibson, 432 F.2d 137, 145 (2nd Cir. 1970), *cert. denied*, 400 U.S. 850, *cert. denied sub nom. American Export Lines et al. v. Gibson*, 400 U.S. 942 (1970).

SAFIR III.

Safir v. Blackwell, 469 F.2d 1061 (2nd Cir. 1972).

SAFIR IV.

Safir v. Kreps, 551 F.2d 447 (D.C. Cir. 1977), *cert. denied*, U.S.L.W. 3215 (1977).

Safir v. Blackwell, Kreps, American Export Lines et al., – F. Supp. – (Dooling 1977) (App. p. 25a).

Maritime Subsidy Board decision in Docket S243

Investigation into Alleged Sec. 810 Violation

14SRR 77 (1973) Pike and Fisher

13SRR 809 (1973) Pike and Fisher

12SRR 1105 (1972) Pike and Fisher

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES

a. Authority for promulgation of *Rules* 28 U.S. Code Annotated Sec. 2072.

Rules of Civil Procedure, by Act of June 19, 1934 (ch. 651 48 Stat. 1064 effective on September 16, 1938 (308 U.S. 645; Cong. Record 83, pt. 1, p. 13, Exec. Comm. 905)).

Specifically *Rule* 15(c) as amended in 1966

> (c) RELATION BACK OF AMENDMENTS. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.
>
> The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

b. Merchant Marine Act 1936, 46 U.S.C. 1227 (see appendix p. 164a).

c. False Claims Act, 31 U.S.C. 232(A)(B)(C) (see appendix p. 165a).

QUESTIONS PRESENTED

Whether an erroneous interpretation of *Rule* 15(c) of the Federal Rule of Civil Procedure should be allowed to prevent the double damage recovery for the United States under the False Claims Act 31 U.S.C. 231, 232, 235 of funds falsely claimed and illegally paid to government subsidy contractors who were in violation of §810 of the Merchant Marine Act 1936 46 U.S.C. 1227.

Whether complicity of the highest government officials in a fraud against the United States would be *relevant* to tolling the 6 year statute of limitations bar to the court's jurisdiction under 31 U.S.C. 235.

STATEMENT OF THE CASE

This single continuing litigation has been at issue for more than a decade. It stems from one period in 1965-1966[1] and concerns the illegal conduct of government subsidy contractors in the American Merchant Marine during that period.

In the ensuing years, petitioner has prosecuted this claim against these ocean carriers to prove that violations of law did in fact occur. In April 1973 the Maritime Subsidy Board of the Department of Commerce held that the violation of Section 810 of the Merchant Marine Act, 46 U.S.C. 1227, was proven. See *Pike* and *Fisher*, 13 S.R.R. 809, 14 S.R.R. 77 (App. 93a). This finding was affirmed by the Secretary of Commerce in September 1974 (see appendix p. 89a).

This case has been before this Court on three occasions by this petitioner[2] and once by the offending carriers Pet. 388-1970, Pet. 229-1973, Pet. 76-1505 and *American Export v. Gibson*, 400 U.S. 942. Certiorari was denied in each instance. In the Pet. 388-1970 (400 U.S. 850) Mr. Justice Douglas was of the opinion that certiorari should have been granted at that time.

On or about June 24, 1968, the first action was initiated in the United States District Court for the Eastern District of N.Y. In essence, the action sought a declaratory judgment and to require the responsible officers of the United States Government to discontinue subsidy payments to the following carriers:

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1. See FMC Docket 65-13 Investigation of Rates on Government Cargoes (11 FMC 263, 1967).

2. 400 U.S. 850, 400 U.S. 942 also Pet. 229 (1973) Pet. 76-1506.

American Export Isbrandtsen Lines, Inc.
American President Lines, Ltd.
Bloomfield Steamship Co.
Farrell Lines Incorporated.
Prudential Grace Lines, Inc.
Lykes Bros. Steamship Co., Inc.
Moore-McCormack Lines, Inc.
Prudential Steamship Co., Inc.
United States Lines, Inc.

and to recover subsidy payments already made on the ground that such carriers had violated Section 810 of the Merchant Marine Act (46 U.S.C. Sec. 1227) by engaging in practices in concert which were unjustly discriminatory or unfair to Sapphire Steamship Lines, Inc.

At the time Petitioner filed the 1968 action, the United States Government did not have in its possession, all of the evidence and information necessary to establish that such carriers had violated Section 810 of the Merchant Marine Act. Most significantly, Sapphire Steamship Lines status as a common carrier on established trade routes from and to the United States which would uniquely qualify for invocation of the statute.

On various dates in 1971, in connection with hearings before the Maritime Subsidy Board, Petitioner made available to the government through Michael J. McMorrow, Esq., of the Federal Maritime Administration, all the information in his files and the files of Sapphire SS Lines; and, as the moving party in the investigation, participated throughout the hearings which took two and one-half years.

During those hearings, *Mr. McMorrow stated* ". . . in the present case, and notwithstanding the inclusion of the requirements of Section 810 of the act in each and every

subsidy agreement, the respondents did not request contractual permission but proceeded to effect rate reductions and to wage battle before the F.M.C. *Once the board was involved, and only through the behest of Mr. Safir,* the respondents firmly deny to this date that rate actions are subject to the section. The distinctions are all too apparent. What remains is a clear provision of the subsidy contract and an explicit statute both binding on the respondents as of *the day they first began, without any overture to the Maritime Administration, the unlawful behavior.*" (Emphasis added). Deceit therefore was recognized.

As a result of Petitioner's oral and documentary evidence and later participation in argument before the Board, the criteria for the finding of a violation as contoured in *Safir v. Gibson,* 1970, *supra,* was met. On April 16th, 1973, the offending carriers were found to have violated the act by the M.S.B. and this finding was affirmed by the Secretary of Commerce in September 1974. See appendix pp. 89-95a also 13 S.S.R. 809 and 14 S.S.R. 77, *Pike* and *Fisher.*

The hearings (S243) before the Maritime Administration, therefore, were an outgrowth of the proceedings which Petitioner initiated in 1968. Petitioner had made known orally and in writing on numerous occasions to the government and to the offending carriers that, if the administrative investigation upheld his contention before the courts in the Second Circuit, Petitioner had the right, on behalf of the United States, to enforce its full legal rights under its subsidy contracts with these carriers and had the right to remuneration in the nature of a *qui tam* allowance for services on behalf of the government. Amendments adding additional claims for damages had uniformly been held to relate back and not to introduce new causes of action (*Vann v. United States,* 420 F.2d 968 (Ct. Cl. 1970); *J. L. Simmons Company, Inc. v. United States,* 412 F.2d

1369 (Ct. Cl. 1969); *Tabacalera Cubana v. Faber Coe & Gregg, Inc.*, 379 F. Supp. 772 (S.D.N.Y. 1974); and most significantly *United States v. Templeton*, 199 F. Supp. 179 (E.D. Tenn. 1961)).

Indeed, it is only because the government in collusion with the contractors avoided the normal course of instituting a legal action for breach of the subsidy contracts by adopting the anomalous procedure of holding administrative hearings to decide whether to sue and then settling before suit was instituted that they circumvented the fact that the carriers filed false vouchers for subsidies.[3] With the 6 year statute of limitations running the government officials delayed decision for 6 years and 3 months.

As alleged in the proposed amended complaint, each of the defendant carriers had entered into subsidy contracts with the government prior to its violation of the Merchant Marine Act in which it expressly agreed (in *haec verba* with Section 810 of the Merchant Marine Act) that it would not

> "engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory of unfair to any other citizen of the United States who operates a common carrier by water, exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports."

Each had expressly agreed that no payment or subsidy of any kind would be made if it violated the above quoted provision. Each voucher which it submitted for a subsidy payment was accompanied by the affidavit of an officer

3. See 32nd Report by the House of Representatives Committee on Government Operations together with additional views 95th Congress 2nd Session House Report No. 95-1680 "Problems in the Relationship Between the Maritime Administration and a Private Trade Organization."

swearing that he was familiar with the terms of the agreement, that the carrier had fully complied with them and was entitled to the payment requested. The subsidy payments to particular carriers during relevant periods were a part of the record before the Maritime Subsidy Board.* Thus, the conduct and transactions which were in issue before the Maritime Subsidy Board as a result of the 1968 complaint and are now *res judicata* are the same as which form the basis for the proposed amended complaint. The amendment conforms the pleadings to the proof and makes appropriate changes in the complaint to reflect the chronology of events and additional claims for damage under the False Claims Act (31 U.S.C. Sec. 231 *et seq.*).

Each of the Safir decisions I through V contain a short history of the case to the date of each decision. In order to preserve time and expense petitioner will set forth the posture of the case since the decision in Safir IV in the Court of Appeals for the District of Columbia Circuit.

On April 26, 1977 this petitioner filed a petition in this Court No. 76-1505 requesting review of an otherwise favorable decision by the District of Columbia Circuit Court of Appeals in Safir IV. The reason for the writ was the need for a precise determination of the limits of the discretion of the Sec. of Commerce *not* to seek recovery of all subsidies paid by the Department of Commerce prior to remand of the District Court for the District of Columbia.

The petition also advanced the collateral estoppel effect of the False Claims Act on the finding of violations of 46 U.S.C. 1227 by the Maritime Subsidy Board and Secretary of Commerce. This Court left undisturbed the procedure established for the remand and did not address the false claims issue at that time. Certiorari was denied.

* See certified report, Maritime Administration, App. p. 162a-163a.

On May 27, 1977, petitioner filed an action in the Eastern District of New York (Docket 77c, 1093) within six years of the final payments by the United States of residual amounts due on subsidy vouchers relating to the eleven month period in 1965-1966. This recovery claim pertained to operating differential subsidies only which were subject to audit and final settlement in 1971. (See Injunction Pendente Lite, 1971, app. 103a). Construction differential subsidies paid during the period of violation had no known residual balances and consequently an amended complaint was filed to cover recovery of this form of subsidy as well as the afore mentioned operating differential subsidies in Docket 68c, 643 with a motion to consolidate both actions.

The new action Docket 77-1093 was dismissed and leave to file the amended complaint was denied on December 20, 1977. (See Memorandum, Order and Annex A appendix p. 25a-65a).

Judge John F. Dooling, Jr. annexed relevant portions of a deposition given by this petitioner to his decision which alleged that ex-President Richard Nixon had entered into a conspiracy with the defendant subsidy contractors through one of the steamship operators, Spyros Skouras, Sr. to defeat this petitioner in his subsidy recovery litigation and minimize the settlement of an existing antitrust suit filed by the bankrupt Sapphire Steamship Lines. The sum of seven million dollars was to be paid to Mr. Nixon for this "deal." This alleged agreement took place prior to his election to the presidency and included the acquiescence of Richard Nixon in the selection of Mr. Skouras' Greek-American compatriot, Spiro Agnew as Nixon's vice presidential running mate (appendix pages 47a-65a).

The proceeding in Docket 77c, 1093 in the Eastern District of New York involves an Order of Dismissal on

jurisdictional grounds and accordingly the uncontroverted pleadings and the allegations excerpted from the Deposition of Marshall Safir and annexed to the Order by Judge John F. Dooling, Jr. must be accepted as true. *Carr v. Learner*, 547 F.2d 135, 137 (1976). *Walker v. Food Machinery Corp.*, 382 U.S. 172, 174-175 (1976) and *United States v. New Wrinkle Incorporated*, 342 U.S. 371, 376 (1976). *Cf.* 5 Wright & Miller, *Federal Practice and Procedure*, Section 1350, pp. 551-553 (1969).

At a status call on January 1978, procedures concerning the remand of the action *Safir v. Kreps*, Docket 74-1474 as a result of the decision in SAFIR IV in the D.C. Circuit were implemented and a motion was filed soon thereafter by this petitioner for a subpoena to the General Services Administrator for certain relevant "Nixon tapes" and other documents. (See affidavit and motion, app. p. 150a-161a).

On March 29, 1978, Judge William Bryant denied the motion. This petitioner then appealed to the D.C. Circuit and on July 28, 1978 the appeal was dismissed as interlocutory but with a *per curiam* order that this dismissal would not preclude the filing of a renewed motion "if future events so required".

On June 27, 1978, the Second Circuit decision in SAFIR V was filed affirming the District Court. On July 11, 1978, this petitioner filed a petition for rehearing en banc.

On October 13, 1978, petitioner filed a Supplemental Memorandum (app. p. 7a) to the en banc request enclosing the House of Representatives Thirty-second Report by the Committee on Government Operations. No. 95-1680, Ninety-fifth Congress. This report concerned the problems existing in a conflict of interest between the Maritime Administration of the Department of Commerce and the National Maritime Council, a private trade organization. Respondent Robert W. Blackwell and H. Clayton

Cook a member of the M.S.B. when S243 was held were sharply criticized. See pp. 1-16 also views of Rep. McCloskey p. 34. This memorandum included a letter sent to Judge Bryant requesting that judicial notice be taken (app. p. 11a).

On December 20, 1978, petitioner deemed the House Report *supra* of sufficient relevance as to constitute a "future event" within the meaning of the July 27, 1978 *per curiam* decision of the D.C. Circuit and renewed his motion for a subpoena *duces tecum* to the General Services Administrator for the Nixon tapes citing Judge Bryant's own guidelines issued November 7, 1978 in *Dellums v. Powell*, 561 F.2d 242 (1977), *cert. denied* July 3, 1978, rehearing denied October 4, 1978. With this, petitioner demanded an "Overton" type hearing (Citizens to Preserve *Overton Park v. Volpe*, 401 U.S. 402 (1970)) based on the bad faith of the government officials charged with the investigation in S243 by the Second Circuit mandate. No action has been taken on the renewed motion to date.

REASONS FOR GRANTING THE WRIT

It was clear from the original complaint in Docket 68c, 643 (appendix p. 143a) that the remedy sought was first, a declaratory judgment under 28 U.S.C. 2201 *et seq.* that this conduct was illegal; and second, that the recovery of monies illegally paid out during the period of violation be implemented for the United States. As can be seen from the complaint, all the carriers were named in the original action albeit not yet as defendants. They all had notice of plaintiff's intent even prior to his filing suit by notice to them and to the Maritime Administration, demanding the cessation of subsidy payments, and that steps be taken to recover from these carriers. The carriers participated in all phases of the legal action to protect themselves from any prejudice. Their activities during the preliminary period 1968 through 1970 are the subject of the charges made against these carriers in open Court before Judge Dooling in this case (see appendix p. 69a through 74a). The Safir Deposition from which Judge Dooling's Annex A was excerpted establishes the period as the summer of 1968 before Nixon's election to the office of presidency that the alleged conspiracy was hatched.

In 1972 this plaintiff brought to the attention of the court his intent to amend the original action as soon as the violation of §810 was finally determined by the administrative process. This occurred even within six years of the violative period. At no time has there been any attempt to change the period of duration of the violation in question, the nature of the subsidies subject to recovery, the parties from whom the recovery would be sought, the beneficiary of the money refunded, nor the conduct which made the payments illegal in the first place.

Point I

The amended complaint adding a false claims "count," arose out of the matter of the original complaint.

As stated in 3 Moore Federal Practice (1978 2d edition) at page 15-198, "the Federal Rules have broadened the meaning of concept of 'cause of action' shifting the emphasis from a theory of law as to cause of action to the specified conduct of the defendents upon which plaintiff relies to force his claim.[1] And an amendment which changes only the legal theory of an action[2] or adds another claim arising out of the same transaction or occurrence will relate back.[3] Thus an amendment will relate back which changes the theory of recovery[4] . . . or increases the amount of damages claimed."[5]

In SAFIR V, Judge Friendly stated that he could find no sound basis for disagreeing with the analysis of Judge Dooling in denying leave to amend the 1968 Complaint with False Claims Act Amendment. A reading of 3 Moore Federal Practice 1978 edition would produce the conclusion that there is *no sound basis* under *Rule* 15(c) as amended in 1966 *to agree* with Judge Dooling. Petitioner respectfully submits that the analysis of Judge Dooling and the Circuit Court affirmation are clearly erroneous.

1. *Smith v. Piper Aircraft Corp.*, (M.D., Pa. 1955) 18 FRD 449 *Green v. Walsh*, 21 FRD 15 (E.D. Wis. 1957).

2. *Land o' Lakes Incorporated v. Buckingham Freight Lines*, (D. Minn. 1972) 351 F. Supp. 102 *aff'd* (CA 8th 1974) 501 F.2d 938. And also *Travelers' v. Brown*, 338 F.2d 229, 234, 235 (5th Cir. 1954). Also *Bradford v. New York Times* (S.D.N.Y. 1969) 13 FR Srv. 2d 15A.3.

3. *Tiller v. Atlantic Coast Line RR*, (1945) 323 U.S. 574 (an action brought under the Federal Employers' Liability Act; amendment alleged violation of Boiler Inspection Act).

4. *U.S. v. Templeton*, 199 F. Supp. 179 (E.D. Tenn. 1961), an amendment under the False Claims Act to add new claims for double damages as additional relief to an amended complaint brought under the Commodity Credit Corporation Act was allowed.

5. *Ibid.* at 179.

The false claims count for additional damages arises out of the matter of the original complaint. When a violation of §810 is found all vouchers submitted for subsidies during the offending period are false. A ham and egg relationship is unavoidable. The original complaint contended that the payments were illegal and in applying for both operating and construction differential subsidies under 46 U.S.C. 1171, the carrier responding falsely represented to the government that they were not parties to any agreement in violation of §810 of the Merchant Marine Act, thereby making them ineligible to receive said subsidies.

The false claims amendment for additional damages is not "new matter", or a "new demand", or a "new claim", or a "new count." The case of *U.S. v. Templeton*, 199 F. Supp. 179, 183 addresses the issue raised by Judge Dooling in this regard. It was stated therein by Judge Wilson "the rule to be followed in Federal Courts is if there is an identity between the amendment and the original complaint with regard to the general wrong suffered and with regard to the general conduct causing such wrong, then the amendment shall relate back and the statute of limitations would not avail to preclude a hearing on the merits." Applying this rule to the case at hand, the issue is not who the original defendant was (in this case the Secretary of Commerce) but what he was being asked to do to correct the wrong suffered. The wrong suffered in this case was, in the words of Judge Friendly, "that public monies had been used to assist some citizens to hurt the others in a manner inimicable to the interests of the United States". SAFIR I, 417 F.2d 972, 979 footnote 8. Further in applying this rule the primary issue here is not the identity of the persons

named as defendants at the outset but the general conduct that caused the wrong. In this case the election of the carriers as members of AGAFBO

> "to continue as a party to or to conform to any agreement with any other carrier or carriers by water or to engage in any practice in concert with another carrier or carriers by water which is unjustly discriminatory or unfair to any other citizen of the United States, etc. . ."

There is no transformation of the original complaint by adding that the illegal payments of subsidy were false, fictitious or fraudulent and subject to double damages. The payments were illegal because the competitive conduct of the recipients was illegal and because Sapphire Steamship Lines met the criteria set forth in the law to define the injured carrier. (See SAFIR I, *supra* p. 977 footnote 6.)

> "the district court thought that withdrawal of subsidies was unrelated to the competitive interest of the injured line since other innocent lines could at once be admitted to the roots and subsidized. Apart from the question of whether any such lines are waiting in the wings, Congress felt that subsidy payments to violators affect the competitive position of the victim and we see no reason why we should or could reject that conclusion."

The vouchers submitted for these payments were false because the carriers held out that they had complied with the provisions of §810 when they had not. So that the violation of §810 and the false billing that was its consequence, both arose out of the same conduct, transaction or occurrence.

> "in essence the amendment seeks only applification of the damages claimed to have arisen out of the conduct complained of in the original pleading. The general rule in this regard is that an amendment increasing the amount of damages claimed or merely varying the prayer for relief does not state a new cause of action and may be allowed after the statute of limitations has run. Thirty-four American jurisprudence limitations of actions, §265." *U.S. v. Templeton*, supra at 184.
>
> Also see *Foman v. Davis*, 371 U.S. 178, *Vann v. U.S.*, 420 F.2d 968 (CT. CL 1970), Applied Data Processing Incorporated v. Burroughs Corporation, 11 FR Srv. 2d 1097 DCD (Conn. 1977).

The opinion of Judge Wilson in *U.S. v. Templeton, supra* is the antithesis of Judge Dooling's holding in regard to relating back. Both the period during which the wrong took place is the same and the deceitful conduct of misrepresentation was integral to the illegal acts themselves. The amounts of subsidy recovery and the method of compilation are unchanged except for the doubling of damages.

Point II

The "conduct transaction or occurrence" test was fully met to allow the amendment under *Rule* 15(c)[6] and there was adequate notice to all parties.

The Courts below are in error in their citing of *U.S. v. Templeton, supra* on the issue of notice because they cite the diversity of the wrong suffered in the first count of the Templeton complaint instead of the identity of the wrong suffered and the conduct causing such wrong in the second count. It is the second count which parallels the circumstances in the instant appeal, not the first. The

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6. See *Longbottom v. Swaby*, 397 F.2d 45, 48 5th Cir. 1968 and *Cf. U.S. v. Johnson*, 288 F.2d 40, 5th Cir. 1961 and *Copeland Motors Co. v. General Motors Corporation*, 199 F.2d 1952.

adequacy of notice on the second count was evidenced in the fact that the 22 bails of cotton which was the subject of the original complaint were the same 22 bails which were the subject of the second count of the amended complaint. In the instant appeal, appellant's demand is for the same relief as in the original complaint, the recovery of all subsidies both construction and operating differential subsidies paid to the named violators in the original complaint save for the doubling of damages.

Templeton is specific and a definitive authority on relating back as it pertains particularly to the False Claims Act. Support for it can also be found in *Williams v. United States,* 405 F.2d 234, 236, 238 (5th Cir. 1968). This was an action wherein the Fifth Circuit reversed a denial of leave to amend under *Rule* 15(c) in an action under the Federal Tort Claims Act. The Court held that as long as the amended complaint refers to the same transaction or occurrence and defendant was put on notice, there will be no bar to amendment and even new defendants and new theories of recovery will be allowed.

As to the issue of notice the defendant carriers received not only notice of the suit to recover subsidies paid during the offending period, but they were informed of a jeopardy even more severe than the doubling of damages which was incorporated in the original complaint and that was the demand for cessation of payment of all subsidies in the future. Since 1969, these violators of §810 have received in excess of four billion dollars—far greater than the amount at issue at double damages here. When these carriers intervened as defendants they did so in time to defend themselves against all issues and, indeed, was subject by the Second Circuit to an Order under *Rule* 19 of the Federal Rules of Civil Procedure if they had not joined in the action as defendants. In this regard, it should be

noted that the Court in SAFIR I, *supra,* at footnote 4, stated as follows "while the parties have not discussed in this court whether the AGAFBO lines were required to be joined as defendants we are concerned that this position of the action in their absence may ". . . as a practical matter impair or impede" their ability to protect their interest in the subject matter of this litigation. F.R.C.P. *Rule* 19. Accordingly, if the District Court should require their joinder or if they should intervene, we would not wish the District Court to feel that anything said in this opinion precludes its considering any new arguments which the AGAFBO lines may bring to its attention."

Later in the *per curiam* opinion of the Court on June 18, 1970, SAFIR II at 145, the issue of notice to these defendants was further put to rest by the following statement:

> "moreover while we relied mainly on this point at 143, we did not at all mean to suggest that the AGAFBO lines should not have been aware of the possible effect of the FMC determination in the proceeding under §810 of the MMA of whose potentiality they were apprised very shortly after the FMC decision."

And so as stated *Williams v. United States, supra,* "determining whether the adversary had fair notice, the usual emphasis on 'conduct transaction or occurrence' is on the operational facts which give rise to a claim by a particular party based on any one or all of the theories conjured up, whether timely or belatedly." In this case, as in *Williams, supra,* the conduct or occurrence (the violation of §810) was based on a constant and unchanging operational set of facts and was stated fully and was subsequently proved. Any attempt to equate the present claim for double damages under the False Claims Act on

an identical set of operational facts which existed then as now, with the diversity situation *Rosenberg v. Martin*, 478 F.2d 520 (2nd Cir. 1973), cited in the courts below is an absurd reading of comparative general fact situations.

In *Rosenberg*, plaintiff gave no notice that a claim for the violation of his rights to a fair trial would be amended with a new and different claim of physical assault years later. The only resemblance between petitioner's case and assault in Rosenberg is the element of surprise through underestimation of the persistence of the plaintiff of whose purpose defendants were fully on notice from the inception of the litigation. The inference that double damages to the carriers and loss of control of the prosecution by government officials represents the new assault is one which has an analogy in *Tiller v. Atlantic Coastline Railroad, supra*, at page 580 and 581. In granting leave to amend, the Court stated:

> "the original complaint in this case alleged a failure to provide a proper lookout for deceased giving improper warning of the approach of a train, to keep the head car properly lighted, to warn the deceased of an unprecedented change in the manner of shifting cars. The amended complaint charged the failure to have locomotive properly lighted. Both of them related to the same general conduct, transaction and occurrence which involved the death of the deceased. There was, therefore, no departure. The cause of action now as it was in the beginning the same. It is a suit to recover damages for the alleged wrongful death of the deceased... There is no reason to apply a statute of limitations when as here the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in the respondent's yard."

"Respondent's yard" in the SAFIR case was the port of Washington, D.C. Petitioner submits that there can be

no reconciliation between "Tiller" on *Rule* 15(c) and the decision of the District Court as affirmed by the Circuit Court.

Point III

The threshold relief sought was for a declaratory judgment in addition to an order compelling agency action.

Contrary to the stated reasons of the lower Courts in denying leave to amend the original complaint, the threshold relief sought in the complaint and the *sina qua non* of any further relief thereafter was for a declaratory judgment that the *conduct* found to be violative of the Shipping Act of 1916 (46 U.S. 814, 817) by the Federal Maritime Commission (11 FMC 263 *et seq.*), in this singular case was violative of the Merchant Marine Act of 1936 as well. There would have been no foundation for declaring payments of subsidy funds to the contractors illegal without such a seminal determination by the District Court. In invoking the jurisdiction of the District Court, counsel for the petitioner in 1968 cited 28 U.S.C. 2201, 2202 (declaratory judgment)—see original complaint appendix page 143a, and the relief demanded was a consequence of this illegal conduct if the court found such illegality of subsidy payments. In 1969, the District Court dismissed the action without addressing this issue at all. See *Safir v. Gulick, et al.*, 294 F. Supp. 630 (1969). This relief was delayed for two years until the decision in *Safir v. Gibson*, 432 F.2d 137-145 (SAFIR II) confirmed that this conduct would be violative of the law if the specific fact situation at the time of the violation was as stated in the complaint and the unsubsidized American ship line victim qualified under the criteria of the statute.

When the District Court holds and the Second Circuit confirms the original action was one to compel agency action that description by itself is incomplete. The Courts compression of plaintiff's claims into a narrow contrast between the FMC decision in Docket 65-13, *supra*, and the failure of the Maritime Subsidy Board to take appropriate action in light of 46 U.S.C. 1227 overlooks the paramount importance of the declaratory judgment that only the Court could supply.

While the action "sought to compel public officers to do what plaintiff contended it was their duty to do, *to this day* the District Court and indeed the Second Circuit have abstained from granting declaratory judgment on the issue of violation, and they have refused to order the government to "commence appropriate legal action to recover the subsidy payments heretofore illegally made which was the demand in the original complaint.

The decision of the Second Circuit in SAFIR V discusses the frustrating background of the case from the point of view of the petitioner and would gently criticize the law officers and government officials who in Judge Friendly's words "controlled the prosecution." In this petitioner's first petition to this Court in 1970, where cert. was denied (although Justice Douglas was of the opinion that certiorari should have been granted at that time, *Safir v. Gibson*, 400 U.S. 850,) the reply brief of petitioner's counsel and a copy of Judge Dooling's proposed order are expository of the tortuous method by which the declaratory judgment was avoided and where this order was transformed into a decade of delay and where this petitioner would now stand accused of having burdened the law officers of the government with the full expense of the "prosecution." Appendix p. 140a-142a. The Department of Commerce held an investigation in S243—the prosecution never took place.

Point IV

The District Court was in error in holding that there was no basis for dismissing the original Federal defendants and substituting the intervening defendants as active wrongdoers under the False Claims Act once the violation of §810 of the Merchant Marine Act 1936 was *res judicata*.

Under the 1966 Amendment to *Rule* 15(c) there is every sound basis for authorizing an amendment to a complaint after the statute of limitations has run that would dismiss the Secretary of Commerce as defendant and cast the carrier defendants as the sole defendants. As has been shown the issue of notice to the carriers was never in question. They were fully aware of the original complaint and received notice of the action even before it was filed. It is stated in 3 Moore, *supra*, page 15-212 "where the plaintiff seeks to change the capacity in which the action is brought or in which the defendant is sued there is no change in the parties before the court, all parties are on notice of the facts out of which the claim arose, and relation back has been allowed in both the case of the plaintiff and the defendant" (*Montgomery Ward v. Callahan*, (C.C.A. 10th—1942) 127 F.2d 32). See *F. Frankel v. Styer*, E.D. Pa. 1962, 209 F. Supp. 509 (from Guardian *ad litem* to administrator of the estate) and *Smith v. Guarantee Service Corporation* (N.D. Cal. 1970), 51 F.R.D. 289. In *Smith v. Guarantee, supra*, it was held that a plaintiff in an action based on violations of the security acts was permitted to amend his complaint to assert an affirmative cause of action against the defendant as an active wrongdoer, the defendant having been named in the original complaint only as a stakeholder. The amendment petitioner here pleads is not distinguishable—a change in the status in the intervening defendants who were willful vio-

lators of the Merchant Marine Act to that of sole defendants and active wrongdoers of a related statutory violation, accepting payment for false claims on the subsidy vouchers submitted for the period that the violation took place.

The change of plaintiff from Marshall Safir to United States *ex rel.* Marshall Safir is routine. The history of the False Claims Act from *U.S. v. Griswold* (D. Oregon 1885), 24 Fed. 361, 366 *affirmed* C.C. Oregon 1887, 30 Fed. 762 to the present is replete with such substitution and is inherent in the act itself. The United States is the real party in interest. As stated in *Rule* 17(a) of the Federal Rules of Civil Procedure ". . . a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought and when a statute so provides an action for the use or benefit of another shall be brought in the name of the United States." In this case the wisdom of *Rule* 17 prevails to protect the United States from the "corrupt arrangement to frustrate plaintiff's endeavor to vindicate his claims" which took place at the highest level of government.

It is stated in 3 Moore, *supra,* 15-233 "the 1966 amendments to *Rule* 17(a) describing a lenient procedure for substituting as plaintiff the real party and interest after defendants objections, will dispose of many problems which might have arisen under *Rule* 15(c) and further illustrates the federal rules general policy in favor of liberal treatment of amendments substituting parties." In this regard the attorney general under the False Claims Act §232(c) could still exercise his rights under this section by indicating his willingness to appear and prosecute. Even if he did not this petitioner with licensed counsel would act for the United States instead of those government officials who controlled what might best be described as the avoidance of prosecution.

A case that is a good illustration of this situation is *U.S. ex rel. Construction Specialties Company v. Travelers' Insurance Company* (D. Colo. 1966), 40 F.R.D. 316, *affirmed sub nom. Travelers' Indemnity v. the United States* (CA 10th Cir. 1967, 382 F.2d 103, 106).

Here the Court of Appeals held that an amendment changing defendants was permitted to relate back because the court found the original defendants had been shielding related corporations who were the proper parties.

As stated in 3 Moore, *supra,* at page 15-22:

"Insurance company," the original defendant, actively participated in the action at the pleading stage. "Indemnity company," the proper defendant, was a wholly-owned subsidiary of insurance company, sharing the same directors, managers and home office address. Allowing the indemnity company to be joined after the statute of limitations, the Court citing and quoting "Treatise," said "when the named defendant created a facade indicating that it was the party in interest when it then knew that it had not written this bond, it served as an indication that the real party had notice and was being protected. This tends to show a relationship between the parties which motivated the protective action. Indeed, if Travelers' Insurance were not interested in insulating Travelers' Indemnity, it would have been satisfied to merely be relieved from defending —it would not now be opposing plaintiff's motion to substitute."

In the Safir case, the Department of Justice acting for the Secretary of Commerce and the Maritime Subsidy Board by an attorney in its admiralty and shipping section opposed petitioner's motion to substitute and filed an affidavit in opposition. The Secretary of Commerce in controlling the action under the guise of prosecution for a period of more than six years to protect his steamship

constituents* until the statute of limitations could be called into question acted in a manner analogous to Travelers' Insurance. The facade must be pierced in this case. The only party representing the United States in good faith during the six year period was this petitioner.

Point IV

The complicity of government officials in a "Corrupt Arrangement" to conceal a fraud and not to prosecute is relevant as it tolls the statute of limitations under the False Claims Act.

The corrupt scheme hatched in 1968 between Richard Nixon and Spyros Skouras acting for himself and others becomes relevant at this point.

The original complaint sets forth the claim that the plaintiff was injured by the illegal payments in 1965 and 1966 to the carriers who conspired to violate 46 U.S.C. 1227. Plaintiff did not then know that he was being victimized by a *new* conspiracy to frustrate his efforts to vindicate his claims and he remained in ignorance of this new conspiracy until late in 1973 while helpless to expedite a decision which could confirm the violation during the seasonable six-year period for an amendment to his complaint. He was not aware that the violation of 31 U.S.C. 231 was being concealed by a delay in the process of decision making under 46 U.S.C. 1227 which was fraudulently inspired by the ex-President himself.

Five years of fraudulent concealment of the conspiracy entered into with the nominee of the Republican Party prior to his election in the summer of 1968 until knowledge of the concealment was in the hands of this petitioner in October 1973, would have tolled the statute until October 1979 and eliminated what the second Circuit claimed were

"serious difficulties with respect to the Statute of Limitations" (See SAFIR V and its footnote 3).

How could the Courts below have held that the corrupt scheme was not relevant to the False Claims Acts claim under these circumstances? This Court has stated in its decision in *Holmberg v. Armbrecht et al.*, 327 U.S. 392 (1945) at page 396

> ". . . fraudulent conduct on the part of defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity based on a mere lapse of time."

Justice Frankfurter goes on to state that "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part the bar of the statute does not begin to run until the fraud is discovered, although there being no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." *Bailey v. Glover*, 21 WALL 342, 348 and see *Exploration Company v. United States*, 247 U.S. 435; *Sherwood v. Sutton*, 5 Mason 143."

In this case the fraudulent concealment by the conspirators, both government and contractors, was facilitated by the Second Circuit's unwillingness to address the issue of the False Claims Act and the plaintiff's rights thereunder in 1972 while he was still in ignorance of the conspiracy. Judge Dooling in his order of December 20, 1977 points out that he himself was willing to address the issue in 1972. But the panel above had refused to clarify these rights after being implored by plaintiff to do so. (See Appendix pages 34a-37a).

The reluctance of the Court of Appeals to examine the False Claims Act aspects of the case acted as a caveat

against the pursuit of a *qui tam* action until the violation of Section 810 was finally established in the administrative investigation. Due dilingence at an earlier time would have had a counter-productive effect against arriving at such determination as the conspiracy was already at work to expand the loophole in SAFIR II, *supra* through endless delay.

The footnote loophole in SAFIR II is restated here as follows:

> "Nothing we have said could be read as preventing the Maritime Administration from investigating the nature and extent of the individual carriers participation in the illegal action, should it find these matters relevant ot its ultimate decision of whether to seek recovery of subsidies paid during the violation and, if so, how much and from whom."

Earlier action to press the False Claims Amendment in the corrupt atmosphere which prevailed could have also resulted in a finding that no violation of Section 810 ever occurred. The arrogance bred from the concept of administrative non-statutory mitigation combined with control of the six year time frame gave the conspirators the confidence to permit a truthful finding of fact by the Maritime Subsidy Board and an affirmation of the violation by Secretary Dent as long as it would be delayed until six years and three months after the original complaint was filed.

The recent decision in *Charles Pettis ex rel. United States v. Morrison Knudsen et al.*, 577 F.2d 668 (9th Cir. 1978) which will be further explored in the companion petition in *U.S. ex rel. Marshall Safir v. American Export Lines Inc. et al.*, is illustrative of this situation:

Judge Sneed in "Pettis" at page 673 states:

> "Of course, a different situation exists when the corruption out of which the false claim arose also serves to prevent government action as where, for example, a corrupt public official who is party to the fraud *prevents government action by concealment or otherwise.*"

The "corrupt scheme" had by this time blossomed into a "incestuous" conflict of interest when the National Maritime Council was formed, and is a testimonial to the way that corruption can seep down and penetrate the second echelon when the highest officials are either "enfeebled or corrupt." (See *Charles Pettis ex rel. United States v. Morrison Knudson Company, supra*, 673. *Cf.* House Government Operations Report, *supra.*)

The Federal Respondent in this petition Robert J. Blackwell, Assistant Secretary of Commerce for Maritime Affairs is severely criticized. Some of these officials* who controlled the avoidance of prosecution are cited in the House Report, *supra* for "blatant" and "outrageous" conflict of interest in their relationships with the government subsidized contractors during the period from 1971 to 1977 and the Report calls for their investigation by the Department of Justice under Title 18 of the U.S. Code.

The payments made in 1971 to the carriers—some of which were withheld by the injunction *pendente lite* ordered by Judge Dooling (see *Safir v. Gibson* memorandum appendix page 103a) were residual balances of the earlier increments paid in 1965, 1966, 1967 *and as such were being paid three years after the Nixon-Skouras conspiracy began.* As stated in *United States v. Klein*, 23 F. Supp. 426, 441, 442 and affirmed in the 3rd Circuit:

> ". . . it is the last date when the government paid any money on a particular claim by which anchorage may be had with the jurisdiction required to maintain a false claims action."

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* The Federal respondent in this petition, Robert Blackwell (who, with his general counsel H. Clayton Cook"controlled the prosecution" members of the Maritime Subsidy Board in S243 in 1973) is still in office under the present administration and was prominent in the proceedings in *U.S. ex rel. Greenberg v. Burmah Oil*, 558 F.2d 43 (2nd Cir. 1977).

Therefore it can be seen that fraudulent concealment of the violation of Section 810 and refusal to prosecute for recovery under the False Claims Act during the period after the conspiracy began and while the final payments were being made pertaining to the violative period, made the Safir disclosure of the corrupt arrangement with ex-president Nixon ***not only relevant but crucial*** to relief under the "Holmberg" exception in the event that his plea for leave to amend under *Rule* 15(c) was rejected on other grounds as was the case here in the Courts below.

In regard to the refusal to prosecute by corrupt officers *U.S. v. Rippetoe,* 178 F.2d 735, 736, 737 (1949) is authoritative. The court held that knowledge in possession of one who has participated in the fraud is knowledge that would be in the hands of one whose interest would be to conceal it and refuse to prosecute it. Facts material to the right of action in this circumstance are not in the hands of those who may be expected to protect the government.

Petitioners deposition and oral affidavit in court which in effect amended his pleadings were uncontroverted by the defendants contractors. These pleadings because they were uncontroverted in the dismissal for lack of jurisdiction have to be accepted by the appellate court as true. *Carr v. Learner,* 547 F.2d 135 (2nd Cir. 1976). 5 Wright and Miller, *Federal Practice and Procedure, Civil Section 1350,* pages 551-553 (1969). *U.S. v. New Wrinkle,* 342 U.S. 371, 376 and *Walker v. Food Machinery Food Corporation,* 382 U.S. 172, 174-175.

When the Court of Appeals upheld the finding of irrelevancy of this conspiracy (by a footnote in SAFIR V) the conclusion is virtually compelled that the Second Circuit had simply refused to grant an Article III forum even when fraud by the subsidy contractors was compounded

by the involvement of corrupt government officials. When this occurs a decision such as *U.S. v. Borin,* 209 F.2d 145 (5th Cir. 1954) which held that fraud and concealment by the subsidy contractor *alone* does not toll the statute sec. 235 falls far short of the issue addressed by Judge Parker in *Rippetoe* and Judge Sneed in *Pettis.* The complaint against Borin by the Attorney General bore great resemblance to petitioner's action in the nature of the deceit and the fact that the subsidies sought to be recaptured were originally paid out "in reliance upon the truth and honesty of defendants certifications and in accordance with . . . regulations providing for tentative payment upon preliminary approval, the subsidy agency paid the defendants claims upon preliminary approval only and prior to receipt of any evidence of non-compliance with [OPA] regulations." *U.S. v. Borin, supra,* at page 146. In the Safir case most of the final payments as stated were paid in 1971—three years after the 1968 conspiracy to cover up the 1965, 1966 deceit.

There is no basis to immunize the fraud when the bribery of the government official involved is an ex-President of the United States.

The peremptory determination of Safir V that the charges of conspiracy involving the recovery of $227,000,000 in illegal payments (app. 163a) from the contract violators and a $7,000,000 fund placed at the disposal of the ex-President of the United States (app. 153a-161a) were not germane to the False Claims Act "count" reduces "relevancy" to a linguistic absurdity to accomplish the denial of the Article III forum for this petitioner. It would quarantine him from the availability of the unassailed exception in *U.S. v. Rippetoe, supra,* which most recently found accord in *Pettis ex rel. U.S. v. Morrison-Knudsen, supra,* that *if it prevents prosecution, government involvement in the fraud tolls the statute* in 31 U.S.C. 235 by the same token as prior knowledge on the part of these officials under 31 U.S.C. 232(c) would not bar the jurisdiction of the court from action later filed.

The Second Circuit in its opinion of SAFIR V evidenced some concern that a citizen-advocate of this petitioner's aggrievement, persistence and perspicacity should be without a remedy to profit for himself after twelve years of litigation because of the restrictive nature of 31 U.S.C. 232C. The Circuit Court implies a willingness to have this Court reconsider the meaning of the phrase "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States at the time such suit was brought." The Second Circuit evidenced sympathy for the petitioner here when it stated "Safir is at the opposite pole from the mere busy body who copies a government's indictment as his own complaint and who brings to light no frauds not already disclosed and no injury to the Treasury not already in the process of vindication . . ." In so stating it was distinguishing *U.S. ex rel. Safir v. American Export et al.*, (1977) from its own decision in *U.S. ex rel. Greenberg v. Burmah Oil Company*, 558 F.2d 43-45, *cert. denied*, 46 U.S.L.W. 3357 (1977).

But in short the Second Circuit would foreclose the Safir actions notwithstanding petitioner's basic right under *Rule* 15(c) which has been so well and so often interpreted and the obvious difference between a relator most of whose information was derived from the New York Times and this relator who was, himself, a victim of false claims and who was the recognized moving force behind he efftort at recoupment for the United States.

The court below also evidenced malaise over the use of literalism as in *U.S. ex rel. Aloff v. Aster*, 275 F.2d 281, 183 (3rd Cir. 1960), *cert. denied*, 364 U.S. 1960 which extended the restrictive clause "considerably beyond the evil sought to be remedied and gives it a broader effect than would be indicated by the legislative history reviewed by Judge Hastie, 176 F. Supp. 208, 209-210, affirmed in

Aster." But all of these positive expressions are nought when the Second Circuit refuses to certiiy this petitioner's case to the Supreme Court as being the one which would be so offensive to the intent of Congress as to call for review.

The concern for the victim of predation was the lynch pin of the decision in SAFIR I and this has been repudiated by that Circuit in SAFIR V. The Second Circuit evidenced deep concern over the Congressional intent regarding the position of a victim of predation by subsidized contractors. Since that decision, each decision has drained vitality from this concern until the slippage culminating in the decision in SAFIR V has nullified both the Congressional intent and the very integrity of SAFIR I, itself.

The following quotations are from SAFIR I and the petitioner submits that the false claims amendment lurked behind every line: (1) The primary concern manifested was the added burden that subsidies imposed on the competitive position of the victim. We think this concern also extends to the interests of a former victim in the recovery of subsidies improperly paid in the past. (2) Recovery of such payment imposes an added cost on the violators and thus will partially make up to the victim for the burden which the earlier payments indirectly imposed on him. (3) We find that $810 is defined to promote the competitive interest of the victim . . . plaintiff Safir stated in an affidavit that he desired to return to the shipping business as soon as possible. (4) The grant to private citizens of a remedy that would not exist in the absence of specific authorization in no way precludes the availability and further relief consistent with the statutory scheme. Even if the victim is successful in a trouble damage suit against the violators, his recovery does not correct the evil at which $810 was aimed, namely that public monies have been used to assist some citizens to hurt others in a manner inimicable to the interests of the United States."

The Court of Appeals for the District of Columbia in *Safir v. Kreps*, 551 F.2d 447, SAFIR IV knew that an amended complaint would be filed when they affirmed his standing to sue stating "of particular importance here is the decision in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) in which the Court added the requirement that "the plaintiff who seeks to invoke judicial power stand to *profit* in some personal interest (if he wins the suit)."

Chief Judge Wright in interpreting SAFIR I reiterates the competitive interest of a victim particularly this petitioner and states that it is enough if Congress thought a victim would profit through recovery of illegally paid subsidies and consequently failure of the government to extend the intended benefit to the victim is injury of fact.

Judge Wright held that no authority had been pointed to which would permit the Secretary of Commerce to adjudicate what Judge Friendly had described as a contract dispute. Appellant respectfully submits that the corrupt scheme is both germane to the False Claims Act Amendment for additional damages and is essential to an understanding of the underlying reasons for a government agency to eschew the normal course of instituting a legal action demanded in the original complaint. When the Second Circuit permitted the adoption of the anomalous procedure of holding hearings to decide whether to sue and then settling before the suit was instituted the agency was able to conceal the fact that the carriers filed false vouchers for subsidies.

The Second Circuit in citing its own decision in *U.S. ex rel. Greenberg v. Burmah Oil*, 558 F.2d 43, as a bar to jurisdiction under 232(c) would overlook its own liberality not to require the existence of government corruption

in the fraud which is the cornerstone of the *Rippetoe* and *Pettis* exception. The Court in *Greenberg* "only where the process of organization produced new information such as the disclosure of the existence or nature of a fraud could it arguably provide a sufficient predicate for jurisdiction." *Greenberg*, at p. 46.

Further, the only approach which could maintain any remaining defense for the contractors divorcing falsity alone, from specific intent to defraud was to avoid confrontation with its own dictum in *Greenberg* to declare the entire "corrupt arrangement" not germane—willy nilly—which it did.

Judge Friendly would reveal in SAFIR V that the Second Circuit sought an argument which would sustain the petitioner in that "no one in government had entertained any thought of pursuing the steamship companies under 31 USC 231." Petitioner respectfully submits that this statement is disingenuous in two respects:

1. The Court in rejecting petitioners motion for leave to amend the original complaint has already likened such initiative as an "assault" on both the government defendants and the subsidy contractors (see *Rosenberg v. Martin*, *supra*. SAFIR V App. p. 21a).

2. The discussion in SAFIR I & SAFIR II with their evidence of "concern for the victim" see *Safir v. Gibson*, 417 F.2d 972, 977, 978 carefully pointed to "common law principles" in recovery of subsidies by the United States under a negative theory that there was no statutory prohibition.

Praise for the initiative of this pro se petitioner in single handedly unearthing an innovative legal theory under the False Claims Act which as amended has been on the books since 1943 and to which a liberal interpre-

tation had been applied by the Supreme Court only a few months before SAFIR I (1969) when this Court decided the case of *U.S. v. Neifert/White,* 390 U.S. 228 (1968) evinces too much generosity for the petitioner and too little for the learned judge's ability to absorb all current legal thought.

The fraud must remain inchoate no longer. Indeed there was every sound basis for disagreeing with Judge Doolings decision. When the Second Circuit finds that putting the agency to the expense of an investigation is an estoppel of the right of the United States and Marshall Safir to recovery under the False Claims Act under *Rule* 15C directly relating back to the original conduct charged to be illegal by the named offenders in the original complaint, it convulates SAFIR I in its Brandeisian concept to act instead as a *bar* to the philosophy of reentry and also the recovery of false claims for the United States (contrast *Foman v. Davis,* 371 U.S. 178 and *U.S. v. Neifert/White, supra.*)

The concept of the False Claims Act may be anathema to some whose faith is secure in the diligence of our law officers or to those who would be the discretionary arbiters of the public weariness with scandal in our most revered institutions. Contrary to the opinion below this *is* the case that is so offensive to the intentions of Congress as to pray for this Court's consideration of the questions presented and to invoke the Court's power of supervision.

Respectfully,

/s/ Marshall P. Safir
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Nos. 78-1239 and 78-1311

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

MARSHALL P. SAFIR,
Petitioner,

v.

ROBERT W. BLACKWELL ET AL.,
Respondents.

MARSHALL P. SAFIR,
Petitioner,

v.

AMERICAN EXPORT LINES, INC. ET AL.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT STEAMSHIP COMPANIES IN OPPOSITION

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March 30, 1979.

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INDEX

CITATIONS

Cases:

CITATIONS—Continued

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BRIEF FOR THE RESPONDENT STEAMSHIP COMPANIES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15a-24a)[1] is reported at 579 F.2d 742. The opinion of the district court (Pet. App. 25a-65a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1978. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on November 28, 1978. The petition in No. 78-1239 was filed on February 9, 1979, and the petition in No. 78-1311 was filed on February 23, 1979. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1) Whether petitioner should have been granted leave to amend a nine-year-old complaint that sought relief against federal officials under the Merchant Marine Act, 1936—and had been moribund for several years—to add a count against private parties under the False Claims Act (No. 78-1239).

2) Whether petitioner's separate, newly filed complaint under the False Claims Act was based on information already known to the United States and was therefore properly dismissed for lack of jurisdiction (No. 78-1311).

STATUTE INVOLVED

The relevant provisions of the False Claims Act are printed at Pet. App. 165a-167a.

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[1] The appendix in No. 78-1239 is identical to that in No. 78-1311, and accordingly all "Pet. App." references herein will not be identified by petition number.

STATEMENT

1. This case presents another episode in a course of litigation that has been proceeding for over ten years.[2] In March 1965, Sapphire Steamship Lines, Inc., fifty percent of which was owned by petitioner, entered the military cargo trade serving routes between United States Atlantic and Gulf ports and ports in the United Kingdom/Bordeaux/Hambourg range. The steamship companies comprising the Atlantic and Gulf American Flag Berth Operators conference ("AGAFBO") lowered their rates to meet this new competition. Pet. App. 28a. Sapphire failed to operate profitably and was adjudged a bankrupt in 1967. Subsequently the Federal Maritime Commission determined that the AGAFBO rates from March 31, 1965 to March 1, 1966 were unreasonably low and unjustly discriminatory with respect to Sapphire, in violation of Sections 15 and 18(b)(5) of the Shipping Act of 1916, 46 U.S.C. 814 and 817(b)(5). *Rates on U.S. Government Cargoes*, 11 FMC 263 (1967).

On June 24, 1968, petitioner filed a complaint in the District Court for the Eastern District of New York, naming as defendants the Secretary of Commerce and officials of the Maritime Administration in the Department of Commerce and seeking declaratory and injunctive relief compelling them to act under Section 810 of the Merchant Marine Act of 1936, 46 U.S.C. 1227, to recover from the federally subsidized AGAFBO members the subsidies paid[3] during the eleven months that

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[2] A detailed exposition of the litigation appears in the appendix to the brief filed in the court of appeals on behalf of the four "non-trade" steamship lines (see text, *infra*). We have lodged a copy of that brief with the Clerk of this Court.

[3] The Merchant Marine Act provides for payment of both "construction-differential" and "operating-differential" subsidies to qualified operators. In broad terms, the construction-differential subsidy is designed to offset the difference between the cost of

the unlawful rates had been in effect.[4] Pet. App. 143a-149a.

2. The district court dismissed the complaint but the court of appeals reversed, ruling (a) that petitioner had standing to bring his suit, (b) that although Section 810 absolutely prohibits current payments to operators found to be actively in violation of its terms, the Secretary has discretion to determine whether to recover past payments, and (c) that that discretion was not unlimited in that the Secretary could not refuse to proceed against the lines without at least considering the interest of petitioner, who asserted a desire to return as soon as possible to the trade. *Safir* v. *Gibson*, 417 F.2d 972 (2d Cir. 1969).[5] In a subsequent proceeding the court of appeals ruled that in determining how to exercise his discretion the Secretary was obliged to accept as *res judicata* the Federal Maritime Commission's determination that the AGAFBO rate reductions were unjustly discrimina-

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building a new ship in an American shipyard and the cost of building the same ship in a representative foreign shipyard; the operating-differential subsidy is designed to offset the difference between certain ship operating costs of a subsidized carrier (*e.g.*, crew wages) and the costs of the same items to the subsidized carrier's foreign competitors. In return for the subsidy the operator agrees to substantial federal regulation of its business and contracts to provide a stipulated number of voyages on defined "essential" trade routes with identified United States-flag vessels employing United States citizen crews. See 46 U.S.C. 1151-1161, 1171-1183; see generally, *Moore-McCormack Lines, Inc.* v. *United States*, 188 Ct. Cl. 644, 649-651 (1969).

[4] Section 810 provides that "[i]t shall be unlawful for any contractor receiving an operating-differential subsidy * * * to continue as a party to or to conform to any agreement with another carrier * * * which is unjustly discriminatory or unfair," and that "[n]o payment of subsidy * * * shall be paid * * * to any contractor * * * who shall violate this section."

[5] Petitioner sought review here of the court of appeals' rejection of his argument that the Secretary was under a mandatory duty to recover all subsidy paid during the eleven month period, but certiorari was denied, 400 U.S. 850 (1970).

tory to Sapphire. *Safir* v. *Gibson*, 432 F.2d 137 (2d Cir.), *cert. denied*, 400 U.S. 942 (1970).

On remand, the Maritime Subsidy Board held a hearing and determined that it would require a partial repayment of subsidy from the "trade lines" (those AGAFBO members that were in actual competition with Sapphire), but not from the "non-trade" lines (those lines that served different routes from Sapphire, did not engage in the rate reductions, and accordingly were held to have only technically violated Section 810 by virtue of their membership in AGAFBO). *Investigation of Alleged Section 810 Violation*, 14 SRR 77 (1973). The then-Secretary of Commerce affirmed that decision, except that he reduced the penalties assessed against the trade lines. Pet. App. 89a, 91a-92a.

3. Petitioner thereupon sought review in the District Court for the District of Columbia, asserting—as he had earlier in the Second Circuit—that the Secretary had no discretion to recover anything less than the full amount of subsidy paid to all of the lines during the period of violation. The district court dismissed the complaint.

The court of appeals affirmed the district court's ruling that the Secretary is not under a mandatory duty to recover all subsidies, but reversed and remanded for determination whether the Secretary's decision constituted an abuse of discretion. *Safir* v. *Kreps*, 551 F.2d 447 (D.C. Cir. 1977). This Court denied Safir's petition for a writ of certiorari (as well as conditional cross-petitions filed by the United States and by the steamship companies), 434 U.S. 820 (1977), and proceedings in the district court on remand are ongoing.

4. The instant case arises out of petitioner's renewed resort to the Eastern District of New York. On May 26, 1977, he filed a complaint against the steamship companies under the False Claims Act, 31 U.S.C. 231-235, alleging that the subsidy vouchers the lines had

submitted in respect to voyages completed during the 1965-1966 period falsely represented that the lines were in compliance with applicable statutory and contractual requirements. Pet. App. 26a. In addition, on September 13, 1977, petitioner moved to assert the same claim by way of amendment to the complaint he had originally filed in 1968. *Id.* 32a.

The district court dismissed the new complaint for want of jurisdiction. Section 232(C) of the False Claims Act provides that the district court "shall have no jurisdiction" over a *qui tam* suit "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States * * * at the time such suit was brought." The district court reviewed at length the information and evidence upon which petitioner's False Claims Act suit was based (Pet. App. 39a-40a) and concluded that it was "unanswerably clear" that such information and evidence was in the Government's possession as of May 26, 1977. In addition, the court ruled that petitioner could not avoid the jurisdictional bar simply because he was himself the source of much of the evidence and information in the Government's possession. *Id.* 41a-44a. The court of appeals affirmed, stating that it was "not altogether happy" about the jurisdictional bar in cases where the would-be plaintiff is the source of the Government's knowledge, but concluding that dismissal was required by the relevant precedent construing the Act and that this case did not warrant the creation of an exception to the rule. *Id.* 22a-24a.

The district court also denied petitioner's motion to amend the 1968 complaint, ruling (Pet. App. 37a):

> "While, as it would be amended, the complaint would in ultimate substance add a False Claims Act Count, that count does not arise out of the matter of original complaint. The original complaint sought to compel public officers to do what plaintiff contended that it was their duty to do. The claim rested on the contrast between the FMC decision that the AGAFBO rates were unjustly discriminatory and the failure of the Maritime Administration, Maritime Subsidy Board, to take appropriate action in the light of 46 U.S.C. § 1227. The new matter would add a completely new claim both as to substantive content and as to the identity of the persons against whom relief was sought. Nothing in the original case turned on the knowing presentation of a false, fictitious or fraudulent claim. There is no basis for authorizing an amendment that would transform the case, in effect dismiss the original defendants, and pursue a completely different claim."

The court of appeals affirmed this ruling as well, quoting the above passage and concluding that "We can find no sound basis for disagreeing with this analysis." Pet. App. 21a. The two petitions herein followed.

ARGUMENT

In affirming the denial of petitioner's motion to amend his old complaint, and the dismissal of his new complaint, the court of appeals correctly applied settled principles to the particular facts of this case. There is no conflict among the circuits on any of the issues petitioner raises, and further review by this Court is accordingly unwarranted.

1. *No. 78-1239.* "It is settled that the grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). In determining whether to allow new counts the trial court may properly consider "the untimeliness of their presentation" (*id.* at 322) and refuse leave to amend if the plaintiff is guilty of "undue delay" (*Foman* v. *Davis*, 371 U.S. 178, 182 (1962)). Here petitioner sought in 1977 to amend a 1968 complaint that had been dormant

for a number of years[6] to add a claim against the respondent steamship companies that by his own admission (Pet. 13, 27) petitioner as long ago as 1972 knew was potentially available to him. In these circumstances the district court did not abuse its discretion in declining "to allow this closed case to be revived by amendment." Pet. App. 34a.

Petitioner argues that "there is an identity between the amendment and the original complaint" (Pet. 15, quoting from *United States* v. *Templeton*, 199 F. Supp. 179, 183 (E.D. Tenn. 1961)); that the proposed amendment therefore meets the standards for amendments that relate back to the date of the original complaint under Rule 15(c), Fed. R. Civ. P.; and that his motion for leave to amend should therefore have been granted. But, even assuming that amendments that would satisfy Rule 15(c) must automatically be granted under Rule 15(a), petitioner's argument must fail, for the courts below correctly determined that the proposed amendment was insufficiently related to the original complaint to meet the requirements of Rule 15(c).

The 1968 complaint charged federal officers with failing to bring an administrative action to recover money al-

[6] Petitioner moved to amend on September 13, 1977. On September 17, 1970, the district court issued its judgment implementing the mandate of the Second Circuit directing an administrative proceeding in *Safir* v. *Gibson*, *supra*, 432 F.2d 137 (Pet. App. 142a). As described above, the administrative proceeding was subsequently concluded and review sought by petitioner in the District Court for the District of Columbia. In the Eastern District of New York petitioner in the meantime made several motions for ancillary relief —*e.g.*, to require certain of the steamship companies to pay into escrow monies expected to become payable to them upon the sale of certain ships (motion denied, Pet. App. 96a, *aff'd*, *Safir* v. *Blackwell*, 469 F.2d 1061 (2d Cir. 1972), *cert. denied*, 414 U.S. 975 (1973))—but from 1970 on that district court made no substantive ruling on the merits of petitioner's complaint and indeed from 1975 on took no action whatever in what by then had become a totally inactive case. See the docket sheet in No. 68-C-643, a copy of which we have lodged with the Clerk of this Court.

legedly wrongfully paid to the steamship companies during a period in which they were found to have participated in an agreement unfair to petitioner. By contrast, the proposed amendment would commence a federal court action directly against the carriers, not by federal officers but by petitioner himself (in a *qui tam* role), to recover twice the money paid, on the ground that the companies submitted knowingly false subsidy vouchers covering the period during which they were determined to have engaged in the prohibited agreement.[7] In light of these differences, the courts below were amply justified in concluding (Pet. App. 21a, 37a):

> "The new matter would add a completely new claim both as to substantive content and as to the identity of the persons against whom relief was sought. Nothing in the original case turned on the knowing presentation of a false, fictitious, or fraudulent claim. There is no basis for authorizing an amendment that would transform the case, in effect dismiss the original defendants, and pursue a completely different claim."

This factual determination does not warrant further review by this Court.[8]

[7] Petitioner's reliance (Pet. 17-18) upon *United States* v. *Templeton*, *supra*, is accordingly misplaced. There, in deciding that one count of a proposed amendment would relate back to the date of the original complaint, the court noted that both amendment and complaint stated a claim under the False Claims Act, the first seeking that Act's damages remedy and the second the Act's forfeiture remedy. 199 F.Supp. at 184. A second count of the proposed amendment was disallowed on the ground, *inter alia*, that it sought to plead a cause of action under a new statute—as petitioner's proposed amended complaint did. *Id.* at 182-183.

[8] Petitioner incorrectly suggests (Pet. 15) that from the determination that the steamship companies engaged for eleven months in an unlawful rate agreement it follows inexorably that any subsidy vouchers submitted for operations during that period violated the False Claims Act because they averred compliance with all contractual and statutory requirements. None of the carriers' con-

Petitioner also asserts (Pet. 26-36) that in passing on his motion to amend the courts below should have taken into account an alleged conspiracy (described *infra*) between high government officials and the respondent steamship companies that tolled the six-year statute of limitations for suits under the False Claims Act. But petitioner's motion to amend was denied because it would completely "transform" the original case (Pet. App. 21a), not because of any limitations bar. Given that dispositive (and correct) ruling, it was not error for the courts below to eschew determining whether there were independent grounds upon which petitioner's motion might be tested.

2. *No. 78-1311.* A private individual seeking to sue under the False Claims Act, 31 U.S.C. 231-235, must notify the United States of the suit and "of substantially all evidence and information in his possession material to the effective prosecution of such suit." 31 U.S.C. 232(C). If "it shall be made to appear that such suit was based upon evidence or information in the possession of the United States * * * at the time such suit was brought," then the district court "shall have no jurisdiction." *Ibid.*

duct was ever characterized by the attempt at concealment that is a necessary element of fraud under that Act (see, *e.g.*, *United States ex rel. Nitkey* v. *Dawes*, 151 F.2d 639 (7th Cir. 1945)). The AGAFBO rate reductions themselves were of course a matter of public knowledge and became the subject of official government concern almost immediately, see Hearings Before the Subcommittee on Federal Procurement and Regulations of the Joint Economic Committee, "Discriminatory Ocean Freight Rates and the Balance of Payments," 89th Cong., 1st Sess. pp. 106 *et seq.* (1965). From that point on the reductions were subject to continuing scrutiny, through petitioner's efforts and otherwise, by Congress, administrative agencies, and the courts. See Pet. App. 39a-40a. Given the public nature of the matter it is difficult to see how the carriers' presentation of subsidy vouchers could possibly have defrauded the Government. The more important point for present purposes, however, is that this issue of fraud has very little indeed to do with the issue originally tendered by petitioner in 1968—the duty of Department of Commerce officials to act in light of the carriers' open participation in the rate reductions themselves.

On May 26, 1977, the day on which petitioner filed his False Claims Act complaint, he notified the Attorney General of the suit by letter and attached "a copy of the complaint with Attachments A and B comprising substantially all the pertinent evidence and information material to the effective prosecution of this suit." Pet. App. 86a. Attachments A and B consisted of the petition and appendix thereto in *Safir* v. *Kreps*, *supra*, *cert. denied*, 434 U.S. 820 (1977) (No. 76-1505),[9] which in turn consisted almost entirely of pleadings, briefs, and decisions already filed in this litigation. The district court dismissed the complaint for lack of jurisdiction under Section 232(C), ruling that it was based on evidence or information already known to the United States. Pet. App. 39a-41a. Petitioner does not deny that all of the evidence recounted by the district court was in the possession of the United States on the date his complaint was filed, and indeed if, as he stated in his letter to the Attorney General and in the complaint itself (*id.* 82a-83a, 86a), the evidence on which his suit was based was fully set forth in the petition and appendix in No. 76-1505, then there can be little doubt that that evidence was already in the Government's possession by May 26, 1977, for petitioner's papers in No. 76-1505 were dated (and presumably filed and served upon the United States on or about) April 26, 1977.

Petitioner asserts, however, that there exists other evidence—namely, of a criminal conspiracy among high government officials and the respondent steamship companies —of which the Government was unaware and the subsequent disclosure of which (by petitioner) "eliminated the bar to the [district court's] jurisdiction." Pet. 15. Both courts below ruled that this new "evidence" was not

[9] Pet. App. 80a, 82a-83a.

germane to the False Claims Act claims. Pet. App. 22a n.5, 38a.[10]

Although the alleged conspiracy was brought to petitioner's attention as long ago as 1973 (see below), he never mentioned it (a) before filing his complaint, (b) in the complaint itself, or (c) in his letter to the Attorney General. Rather, it was revealed for the first time in a deposition of petitioner taken on September 28, 1977,[11] when he testified that, with a $7 million payment, the respondent steamship companies in 1968 bribed former President Nixon to select Spiro T. Agnew as his vice-presidential running mate, to appoint other hand-picked individuals to the Maritime Administration and the Federal Maritime Commission, and to instruct them to disregard the law in reaching their decisions in administrative and judicial matters involving the carriers and petitioner. The only factual basis asserted by petitioner for this startling charge was that in October 1973 a journalist whom he scarcely knew telephoned him and asked him whether he had ever heard that such a conspiracy existed. Pet. App. 48a-49a. Petitioner himself found the suggestion that such a bribe may have occurred "improbable" and "bizarre":[12] he made no effort to verify the reporter's suspicions and when, several months later, he visited the reporter, the latter was unresponsive and gave the impression that he wished he had never talked to petitioner in

[10] The district court also ruled (Pet. App. 38a) that evidence of the alleged conspiracy would not overcome the jurisdictional bar because by petitioner's own account (*id.* 50a) it came from "leaks" from the Watergate Prosecutor's Office. The court of appeals found it unnecessary to pass on the issue. *Id.* 22a n.5.

[11] Petitioner's suggestion (Pet. 13) that "the allegations regarding the 'corrupt arrangement' [are] set forth in the pleadings" is incorrect and his assertion (*ibid.*) that the matters asserted in his deposition "must be accepted as true" is accordingly not well taken.

[12] At page 40 petitioner's deposition, not reproduced in the appendix, petitioner stated, "I felt the whole conversation at the time was bizarre anyway and it was highly improbable, it still does."

the first place. *Id.* 62a-65a. Petitioner apparently let the matter lie until he raised it in his deposition.

Relying on *United States* v. *Rippetoe*, 178 F.2d 735 (4th Cir. 1949), which held that knowledge by a government officer of a fraud in which the officer was participating cannot be imputed to the United States under Section 232 (C), petitioner appears to suggest that the district court had jurisdiction over his False Claims Act complaint because the government officials to whom he presented the information and evidence upon which it was based were the very officials "who had entered into a corrupt arrangement with the perpetrators of the fraud and whose interest it was to conceal the fraud and to defeat its prosecution." Pet. 4 (first question presented), 10-13, 15. If that is petitioner's argument, however, then this case is not at all like *Rippetoe*. Petitioner submitted the information and evidence underlying his suit to the Justice Department, which was not among those said by petitioner to have been tainted by the alleged conspiracy. Moreover, the alleged conspiracy involved officials in the Nixon Administration, which ended on August 9, 1974—long before petitioner presented his evidence and information in May 1977 to the Attorney General. Thus, even if one could ascribe some credibility to petitioner's unsupported accusations of conspiracy,[13] there is no indication whatever that the officials to whom petitioner presented his information and evidence were involved in that conspiracy,

[13] But see the Memorandum and Order of March 29, 1978 in *Safir* v. *Kreps*, C.A. No. 74-1474 (D.D.C.) (the pending litigation to review the Secretary's decision not to require repayment of all subsidies), denying petitioner's motion for a subpoena *duces tecum* directed to the Administrator of the General Services Administration to produce the "Nixon tapes" so that petitioner might attempt to verify his suspicions: the court ruled (slip op. 4) that petitioner had failed sufficiently to substantiate the allegations of fraud or corruption. (Petitioner has renewed that motion and it is now *sub judice* in the district court.)

and therefore the courts below correctly held that petitioner's accusations were irrelevant to the False Claim Act complaint.

Petitioner may alternatively be suggesting that the revelation of the alleged conspiracy "eliminated the bar to the [district court's] jurisdiction" (Pet. 15) because until federal officials outside of the allegedly corrupt group learned from petitioner of the conspiracy involving the Maritime Administration they had no reason to suspect fraud in the submission and payment of sudsidy vouchers. Here again, however, the facts will not cooperate. As the district court determined (Pet. App. 39a-40a), the facts surrounding the payment of subsidy, and indeed the question whether to pay subsidy, were thoroughly aired and debated not only in administrative, but also in congressional and judicial forums before, during, and after the period of alleged conspiracy which is said to have disabled the Government. In short, this alternative suggested theory fares no better than the first: the evidence of alleged conspiracy, even if it could be regarded as creditable, was properly held irrelevant to the question of jurisdiction under Section 232(C).

Petitioner incorrectly asserts (Pet. 12-13) that there is a conflict between the decision below and the decision of the Third Circuit in *United States* v. *Aster*, 275 F.2d 281 (1960).[14] The Second Circuit expressly followed *Aster* (Pet. App. 24a), as did the only other court of appeals to our knowledge to have considered the issue. *Pettis ex rel. United States* v. *Morrison-Knudsen Co.*, 577 F.2d 668, 672-673 (9th Cir. 1978).

[14] Petitioner also asserts (Pet. 8) that the court of appeals in this case "held that clarification of the meaning of Sec. 232(C) would be of benefit to the Courts in general if the Supreme Court would assume the task." We can find no such statement in the court of appeals' decision.

CONCLUSION

The petitions for a writ of certiorari should be denied.[15]

Respectfully submitted,

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[15] "As the prevailing part[ies], [respondents are] of course free to defend [their] judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *State of Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, No. 77-388 (January 16, 1979), slip op. at 15, n.20. Accordingly, should review be granted, we would renew our arguments, properly raised but not passed upon below, (a) that peti-

tioner's motion to amend should be denied for the additional reason that the district court lacked jurisdiction by virtue of 31 U.S.C. 232(C) since even in 1968, when petitioner's original complaint was filed, the United States knew all of the evidence and information upon which petitioner's False Claims Act count was based, and (b) that the new False Claims Act complaint was properly dismissed because the statute of limitations had run and because the lines' submission of subsidy vouchers was as a matter of law not fraudulent.

No. 78-1239

In the Supreme Court of the United States

OCTOBER TERM, 1978

MARSHALL P. SAFIR, PETITIONER

v.

ROBERT W. BLACKWELL, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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1. Petitioner brought this action in 1968 on behalf of himself and Sapphire Steamship Lines, Inc., against the Secretary of Commerce and two other Commerce Department officials. The complaint, filed in the United States District Court for the Eastern District of New York, sought mandamus, an injunction and a declaration to compel the defendants to enforce a decision of the Federal Maritime Commission against the Atlantic and Gulf American-Flag Berth Operators (AGAFBO), a conference of military cargo shippers. The Federal Maritime Commission had determined that, between 1965 and 1966, AGAFBO engaged in predatory reductions of shipping rates to the detriment of Sapphire Steamship Lines, in violation of the Shipping Act of 1916, 46 U.S.C. 814. As a result of that violation, petitioner alleged, AGAFBO members lost their right to receive subsidies under the Merchant Marine Act of 1936, 46 U.S.C. 1227. Petitioner

claimed that the Secretary should cease further subsidy payments to AGAFBO members and should compel them to repay all subsidies received while they engaged in conduct violative of the Act (Pet. App. 143a-149a).

The district court dismissed petitioner's complaint, but the Second Circuit determined that petitioner had standing to seek relief. *Safir* v. *Gibson*, 417 F. 2d 972 (2d Cir. 1969), cert. denied, 400 U.S. 850 (1970). The Second Circuit also determined that the Secretary was bound by the prior finding of the Federal Maritime Commission that the AGAFBO rate reductions were unreasonable. *Safir* v. *Gibson*, 432 F. 2d 137 (2d Cir.), cert. denied, 400 U.S. 942 (1970).[1]

In response to the mandate of the Second Circuit, the Secretary ordered partial repayment of subsidies received by certain AGAFBO members (Pet. App. 18a-19a). Petitioner sought review of that determination in the United States District Court for the District of Columbia, claiming that the Secretary must recover the full amount of the subsidies paid to all of the carriers during the period of the violation. The district court dismissed petitioner's complaint, but the court of appeals reversed and remanded for a determination whether the Secretary had abused her discretion. *Safir* v. *Kreps*, 551 F. 2d 447 (D.C. Cir.), cert. denied, 434 U.S. 820 (1977).[2]

In September 1977 petitioner moved to amend his original complaint in the Eastern District of New York. He sought to add a claim under the False Claims Act, 31 U.S.C. 231, alleging that the federal subsidy vouchers filed by AGAFBO members falsely

[1]Following this decision, the members of AGAFBO intervened (Pet. App. 18a-19a).

[2]Proceedings on remand in the district court are still pending.

represented that the members were in compliance with applicable statutory and contractual requirements.[3] The district court denied the motion to amend the complaint (Pet. App. 25a). The court held that petitioner's belated amendment could not "relate back" to the time of filing ot the original complaint under Fed. R. Civ. P. 15(c), pointing out the following (Pet. App. 37a):

> While * * * the complaint would in ultimate substance add a False Claims Act Count, that count does not arise out of the matter of original complaint. The original complaint sought to compel public officers to do what plaintiff contended that it was their duty to do. * * * The new matter would add a completely new claim both as to substantive content and as to the identity of the persons against whom relief was sought. Nothing in the original case turned on the knowing presentation of a false, fictitious or fraudulent claim. There is no basis for authorizing an amendment that would transform the case, in effect dismiss the original defendants, and pursue a completely different claim.

The court of appeals affirmed (579 F. 2d 742; Pet App. 20a-21a).[4]

[3]The False Claims Act provides that under some conditions private parties may bring a civil action on behalf of the United States against a person who has presented a claim against the United States "knowing such claim to be false, fictitious, or fraudulent." 31 U.S.C. 231-235. The private plaintiff in such an action is designated a "relator," and the action is known as a "qui tam" proceeding. See generally *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 541 (1943).

[4]The court of appeals also affirmed the district court's dismissal of a new complaint filed by petitioner against the members of AGAFBO (Pet. App. 21a-24a). Petitioner has sought review of that decision in a separate petition (No. 78-1311). Petitioner's new complaint asserted a claim under the False Claims Act that is

2. The courts below correctly determined that petitioner could not file an amended complaint setting forth a new claim against new defendants nine years after filing his original complaint. The statute of limitations under the False Claims Act requires that claims be asserted "within six years from the commission of the act, and not afterward." 31 U.S.C. 235. Petitioner sought leave to amend his complaint in September 1977, more than 11 years after the shippers purportedly filed false claims for subsidies and more than six years after they received the subsidies sought to be recovered by the amended complaint.[5] Thus, the United States' right to recover under the False Claims Act accrued more than six years before the date on which petitioner sought to amend his complaint.

Petitioner's contention that the statute of limitations is inapplicable because of "fraudulent concealment" on the part of the shippers is unavailing. The limitations period in the False Claims Act is jurisdictional, and equitable tolling principles do not apply. See *United States* v. *Dawes*, 151 F. 2d 639, 644 (7th Cir. 1945), cert. denied, 327 U.S. 788 (1946); *United States* v. *Borin*, 209 F. 2d 145, 147-148 (5th Cir.), cert. denied, 348 U.S. 821 (1954). Moreover, the decision of the Federal Maritime Commission was filed in 1967, more than six years before petitioner attempted to amend his

similar to the claim contained in his proposed amended complaint. Pursuant to 31 U.S.C. 232(C), the United States declined to appear in that separate proceeding.

[5]Petitioner concedes that the subsidy payments sought to be recovered by the amended complaint were made more than six years before he attempted to plead a False Claims Act cause of action, and that his amendment strategy was adopted to avoid the limitations bar (Pet. 10; see also Pet. App. 20a n.3).

complaint. By then the problem was in the open, and further delay on petitioner's part was not excusable on this ground.[6]

Under these circumstances, the district court properly denied leave to file an amended complaint. The court had ample discretion to forbid this belated revival. See generally *Foman* v. *Davis*, 371 U.S. 178, 182 (1962). Moreover, quite without regard to the exercise of discretion, the amendment was forbidden because it could not "relate back" to the date of the original filing under Fed. R. Civ. P. 15(c) unless the claim alleged in the amended pleading "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." As the courts below correctly determined, petitioner's amended complaint contains a new claim for a new kind of relief resting on the new theory that the shippers defrauded the United States by filing false claims; the original claim rested on the theory that the United States breached its duty by failing to recover subsidies paid to shippers that had engaged in predatory pricing. Rule 15(c) does not permit petitioner to assert a new claim arising from a different breach of duty by different defendants. See, *e.g.*, *Barnes* v. *Callagan & Co.*, 559 F. 2d 1102, 1106 (7th Cir. 1977); *Rosenberg* v. *Martin*, 478 F. 2d 520, 526-527 (2d Cir.), cert. denied, 414 U.S. 872 (1973); *Young* v. *Pick Hotels-Washington Corporation*, 420 F. 2d 247, 248-249 (D.C. Cir. 1969).

[6]All of the essential facts were known to (or easily could have been learned by) petitioner in 1967. Petitioner referred to a possible qui tam action under the False Claims Act before the district court and the court of appeals in 1972. The decision not to pursue that claim until 1977 was petitioner's alone. See Pet. App. 19a n.2.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1979

DOJ-1979-04

78-1239

IN THE

Supreme Court of the United States

DOCKET NO.

MARSHALL P. SAFIR,

Petitioner,

vs.

ROBERT W. BLACKWELL, Individually and as Assistant Secretary of Commerce, AMERICAN EXPORT LINES, LYKES BROS. S.S. CO. INC., AMERICAN PRESIDENT LINES, FARRELL LINES INC., PRUDENTIAL LINES INC., P.S.S. STEAMSHIP CO. INC., UNITED STATES LINES INC., MOORE McCORMACK LINES INC.,

Respondents.

Appendix to Petition for Writ of Certiorari

MARSHALL P. SAFIR,
Pro Se,

41 Flatbush Avenue,
Brooklyn, New York 11217
(212) 858-2700

N.J. Appellate Printing Co., Inc., South Plainfield, New Jersey (201) 753-0200

TABLE OF CONTENTS TO APPENDIX

Table of Contents to Appendix

Table of Contents to Appendix

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

September 18, 1978

Mr. Marshall P. Safir
41 Flatbush Avenue
Brooklyn, New York 11217

Re: Marshall P. Safir v. Juanita Kreps, Secretary of Commerce, et al.

Marshall P. Safir v. American Export Lines, Inc., et al.

Dear Mr. Safir:

Your applications for extensions of time to file a petition for a writ of certiorari in each of the above cases, received September 14, 1978, are herewith returned.

Under the Rules of this Court, if you have made a timely petition for a rehearing, the ninety days allowed for filing a petition for a writ of certiorari do not begin to run until the rehearing has been acted upon.

After conferring with the Court of Appeals for the Second Circuit, I have found that you have made such a timely petition in these cases, which have not yet been acted upon. As such, an application for an extention of time is presently premature.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By

/s/ Francis J. Lorson
Francis J. Lorson
Deputy Clerk

th
Enc.
cc: Hon. Wade H. McCree, Jr.
Kominers, Fort, Schlefer & Boyer
Kirlin, Campbell & Keating
Foley, Hoag & Elliot
Barrett, Smith, Schapiro & Simon
Shea & Gardner

CORRECTED COPY

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of November, one thousand nine hundred and seventy-eight.

----------x

Marshall P. Safir and Sapphire Steamship Lines Inc.,
Plaintiff

Marshall P. Safir, 77-6219
Plaintiff-Appellant, 77-7626

v.

Robert J. Blackwell, Assistant Secretary for Maritime Affairs, United States Department of Commerce, Successor to and Subsitituted for James W. Gulick and Andrew Gibson, etc. et.al.,
Defendants

American Export Isbrandtsen Lines Inc. et. al.,

----------x

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant pro se, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Irving R. Kaufman
Chief Judge
IRVING R. KAUFMAN

CORRECTED COPY

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of November, one thousand nine hundred and seventy-eight.

Present: HON. HENRY J. FRIENDLY

HON. WILLIAM H. TIMBERS
Circuit Judges

HON. WALTER E. HOFFMAN
District Judge

Marshall P. Safir, and Sapphire Steamship Lines, Inc.,
Plaintiff

Marshall P. Safir,
Plaintiff-Appellant 77-6219
v. 77-7626

Robert J. Blackwell, Assistant Secretary for Maritime Affairs, et.al.
Defendants

American Export Isbrandtsen Lines Inc., et. al.,
Defendants-Appellees.

A petition for a rehearing having been filed herein by the appellant pro se

Upon consideration thereof, it is

Ordered that said petition be and it is hereby DENIED.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARSHALL P. SAFIR,

Plaintiff-Appellant,

Docket No. 77-6219

77-7626

-against-

ROBERT J. BLACKWELL, Assistant Secretary for Maritime Affairs, United States Department of Commerce, et al,

Defendant-Appellees.

and

UNITED STATES OF AMERICA, ex rel. MARSHALL P. SAFIR and MARSHALL P. SAFIR,

Plaintiffs-Appellants,

and

AMERICAN EXPORT LINES, INC., et al,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Supplemental Memorandum to Petition for Rehearing en Banc.

MARSHALL P. SAFIR
Pro Se
41 Flatbush Avenue
Brooklyn, N.Y. 11217

Supplemental Memorandum to Petition for Rehearing en Banc.

Petitioner respectfully requests this Court to take judicial notice of the annexed Thirty-Second Report by the Committee on Government Operations, together with Additional Views submitted to the second session of the 95th Congress and transmitted by the Chairman to the Speaker on October 2, 1978.

The report no. 95-1680 on pages one through sixteen set forth the relationships between Assistant Secretaries for Maritime Affairs Gibson (1971) and his successor Blackwell (1972) to the present date in an "outrageous"[1] conflict of interest when they and their General Counsel H. Clayton Cook, Jr. (cf pp. 12-15) sat on the Maritime Subsidy Board concurrently in the hearing mandated by this Circuit in its decisions in Safir I and Safir II while they were initiating the establishment of a trade association. They sat on the Board of Directors of this trade association whose purpose was to protect the interests of ODS contractors and whose predominant members were the named carriers under investigation for the violation of section 810 MMA 1936.

In docket 77-7626, appellant has alleged not only that the claims were false, but also that there was corruption upon the part of

[1] See views of Rep. Paul McCloskey, pp. 31-34 of the report.

government in dealing with them. This House report bears out this corruptive conflict of interest on the part of the government officers charged with the responsibility by this Circuit to decide whether to seek prosecution.

As stated in U.S. et al. v. Rippetoe et al, 178 F.2d at 736, as follows:

> "...(3) In the second place, we do not think that knowledge on the part of a government official who is implicated in the fraud precludes suit by the informer. The whole history of the provision shows that its ourpose was, not to bar bona fide suits by informers merely because corrupt officials of the government might have participated in the fraud or refused to prosecute it, but to prevent the bringing of parasitical actions by those who sought to profit from governmental investigations or prosecutions by using the evidence which these had developed, as occurred in United States ex rel. Marcus v. Hess, 317 U.S. 537,63 S.Ct. 379,87 L.Ed. 443, the decision in which led directly to the legislation of which the provision here is a part ...". (Emphasis added.)

Contrary to involving the government with the "full expense of the prosecution" (see Petition for Rehearing, Attachment A, Slip opinion, at p. 3674), the mandate of the Second Circuit in Safir II was converted into a defense for the government and industry acting in concert to insure against the requirement of the Department of Commerce to seek prosecution. No moneys were expended in Safir's behalf to the end of his reentry into business by the Department of Commerce in what

the Report terms as "outrageous" and "blatant" conflict of interest. Appellant Safir should not be disqualified and foreclosed from a false claim act remedy when the improper relationship caused the Department of Commerce to share with these violating carriers the full expense not of the prosecution, but of the defense. The cost of the prosecution during the entire period from 1971 to 1974 when the litigation was in the administrative process mandated by this Circuit in Safir I and II, was, on the basis of the revelations in the House Report, alwasy the burden of this petitioner.

Attached hereto is a copy of petitioner's letter to Chief Judge William T. Bryant of the U. S. District Court for the District of Columbia, covering the same subject matter as it pertains to the continuing review action under the Administrative Procedure Act.

Respectfully submitted,

/s/ Marshall P. Safir

Marshall P. Safir
Pro Se,
Petitioner

Dated: October 13th, 1978

MARSHALL P. SAFIR
41 Flatbush Avenue
Brooklyn, N. Y. 11217

October 12th, 1978

The Honorable William P. Bryant
Chief Judge United States District Court
for the District of Columbia
Washington, D. C.

Re: Dockets 74-1474 Safir v. Kreps et al.
74-1788
75-0055

Dear Judge Bryant:

On October 2nd, 1978, the Committee on Government Operations of the House of Representatives submitted to the Speaker its House Report No. 95-1680 Union Calendar No. 908. This report by the Commerce, Consumer and Monetary Affairs Subcommittee is entitled, Report on Problems in the Relationships Between the Commerce Department's Maritime Administration and the National Maritime Council, A Private Trade Organization.

The report contains additional views of Rep. Paul McCloskey, a member of the Committee and also of the House Merchant Marine and Fisheries Committee.

While the report initially was inspired by "grass roots lobbying" aspects of the relationships in 1977 and 1978, the Committee found, as follows:

"(a) The relationships between the Maritime Administration, a subsidy and regulatory agency, and the National Maritime Council, a private trade organization, was a blatantly improper one from its inception in 1971 and demonstrated an utter disregard for conflict-of-interest requirements and considerations."

I am enclosing six copies of the House Report with this letter, Att. I, and hereby request that judicial notice be taken of the adjudicative facts therein as the period during which this illicit liason was countenanced by Secretaries Stans, Peterson, Dent, Richardson and Kreps spans all the years of the Safir litigation and indeed the Assistant Secretaries for Maritime Affairs Andrew Gibson (in 1971) and Robert J. Blackwell, who with their General Counsel H. Clayton Cook (in 1972, 1973) initiated the establishment of this trade association with voting rights for the government members.

These men also sat in judgment and voted for the mitigation theories expanded in the MSB decision in Docket S-243. These formed the basis for the final decision by Secretary Dent in 1974.

The Report, and in particular pages 1 through 16, and the additional view of Representative McCloskey, effectively destroy any facade of impartiality or good faith. Any presumption of the validity of a "mitigation" theory in this case which I addressed in my appeal brief in the Court above on July 17, 1978 (dismissed without prejudice on July 27, 1978) must also be seen in the light of this Report.

Your order of March 29, denying my motion for the Nixon tapes at that time evidenced your need to be convinced by a stronger showing of the bad faith on the part of the government officials responsible for the decision before you would allow supplementation of the record in an "Overton" type hearing. Plaintiff herewith submits that this Report is the "smoking gun".

My brief on appeal from your March decision is now part of the record before you by your fiat of Sept. 9, 1978. I respectfully offer pages 9-14 as sufficient support for the subpoena of the relevant tapes and other discovery documents regarding gift of material value given to these officials by the subsidized carriers which were alluded to in the transcript of the hearing before the Subcommittee.

I have apprised the Second Circuit Court of Appeals of this Report, since as of this date no action has been taken on my Petition for Rehearing en Banc of the False Claims Amendment to the original complaint I filed in 1968 or to the dismissal of the action under 31 USC231,232 that I filed in 1977 in the USDC EDNY Docket 77-1093. I submit herewith as Attachment II my supplemental memorandum to the Second Circuit about House Report No. 95-1680 Union Calendar 908.

Under these circumstances, I request that the pretrial hearing be convened so that a renewed motion for relevant Nixon tapes and other evidence can be heard before this Court. The House Report represents "one of those future events" which would trigger the renewal of such motion and which formed the basis of the United States Court of Appeals for the

District of Columbia's decision per curiam in Safir v. Kreps on July 27th, 1978.

Respectfully yours,

/s/ Marshall P. Safir

Marshall P. Safir
Pro Se

Copies sent to:
Clerk U.S. Court of Appeals for the Second Circuit
J. Franklin Fort, Esq.
T.S.L. Perlman, Esq.
James N. Jacobi, Esq.
Elmer C. Maddy, ESq.
Robert T. Basseches, ESq.
Verne W. Vance, Jr., Esq.
Allen van Emmerick, Esq.
Daniel H. Margolis, Esq.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 770, 840—September Term, 1977.

(Argued May 31, 1978 Decided June 27, 1978.)

Docket Nos. 77-6219, 77-7626

MARSHALL P. SAFIR,

Plaintiff-Appellant,

v.

ROBERT J. BLACKWELL, Assistant Secretary of Commerce, et al.,

Defendants-Appellees.

MARSHALL P. SAFIR,

Plaintiff-Appellant,

v.

AMERICAN EXPORT LINES, INC., et al.,

Defendants-Appellees.

Before:

FRIENDLY and TIMBERS, *Circuit Judges,*
and HOFFMAN, *District Judge.**

* Of the District Court for the Eastern District of Virginia, sitting by designation.

Appeals from orders of the District Court for the Eastern District of New York, John F. Dooling, *Judge*. One order denied plaintiff's motion to amend a complaint filed in 1968 against United States government officials to compel them to take action to recover subsidies alleged to have been illegally paid under § 810 of the Merchant Marine Act, 1936, 46 U.S.C. § 1227, see *Safir* v. *Gibson*, 417 F.2d 972 (2 Cir. 1969), *cert. denied*, 400 U.S. 850 (1970), so as to state a claim against the intervening subsidy recipients under the False Claims Act, 31 U.S.C. §§ 231 and 232. The other order dismissed an action brought in 1977 against the subsidy recipients under said Act.

Affirmed.

MARSHALL P. SAFIR, Brooklyn, N.Y., *Pro Se*.

GILBERT S. FLEISCHER, Esq., Department of Justice, New York, N.Y. (Barbara Allen Babcock, Assistant Attorney General, and David G. Trager, United States Attorney for the Eastern District of New York, of Counsel), *for Defendants-Appellees Robert J. Blackwell, et al.*

ELMER C. MADDY, Esq., New York, N.Y. (Kirlin, Campbell & Keating, Esqs., *for Defendant-Appellee United States Lines, Inc.*: James N. Jacobi, Esq., and Kurrus, Dyer, Jacobi & Mooers, Esqs., *for Defendant-Appellee American Export Lines, Inc.*: J. Franklin Fort, Esq., T.S.L. Perlman, Esq., William H. Fort, Esq., and Kominers, Fort, Schlefer & Boyer, *for Defendants-Appellees Lykes Bros. Steamship Company, Inc. and Moore-McCormack Lines, Inc.*, of Counsel).

ROBERT T. BASSECHES, Esq., Washington, D.C. (Shea & Gardner, Esqs., Daniel H. Margolis, Esq., Warren L. Lewis, Esq., and Bergson, Borkland, Margolis & Adler, *for Defendants-Appellees American President Lines, Ltd., Prudential Lines, Inc., and PSS Steamship Company, Inc.*; Verne W. Vance, Jr., Esq., Arthur G. Telegen, Esq., and Foley, Hoag & Eliot, Esqs., *for Defendants-Appellees Farrell Lines*; Barrett, Smith, Schapiro, Simon & Armstrong, Esqs., *for Defendants-Appellees American President Lines, Ltd., Prudential Lines, Inc., PSS Steamship Company, Inc., and Farrell Lines, Inc.*, of Counsel.)

FRIENDLY, *Circuit Judge*:

Plaintiff-appellant Marshall P. Safir has been laboring for more than a decade to obtain a recovery for the United States of subsidies alleged to have been illegally paid to members of the Atlantic and Gulf American Flag Berth Operators (AGAFBO). The Federal Maritime Commission (FMC) held, on December 8, 1967, that in 1965 AGAFBO, with the purpose of eliminating Mr. Safir's company, Sapphire Steamship Lines, Inc. (Sapphire), from competing with the conference lines, had promulgated rates for Government cargoes in the North Atlantic trade which were so unreasonably low as to be detrimental to the commerce of the United States, contrary to the public interest, and, in consequence, violative of §§ 15 and 18(b)5 of the Shipping Act, 1916, 46 U.S.C. §§ 814, 817(b)(5). *Rates on U. S. Government Cargoes*, Docket No. 65-13, 11 F.M.C. 263, 287. Safir then requested the appropriate

government officials to recover subsidies allegedly paid illegally to AGAFBO members, on the grounds that these same discriminatorily low rates constituted a violation of § 810, Merchant Marine Act, 1936, 46 U.S.C. § 1227. These efforts proving unsuccessful, he brought a suit in 1968 in the District Court for the Eastern District of New York to prod the officials into action. Safir was rebuffed by the district court, but met with success here. *Safir* v. *Gibson*, 417 F.2d 972 (1969), *cert. denied*, 400 U.S. 850 (1970) (*Safir* I).

However, the Maritime Subsidy Board decided to follow an expensive and time-consuming course which would have required relitigation of the issues of violation already determined by the FMC. When Safir sought the aid of the district court in avoiding such duplicative proceedings, the law officers of the Government opposed him and the district court agreed. Again we took a different view, both when the appeal was first heard with only the Government as appellee, and later when the subsidy recipients, who had previously abstained from participating, *see* 417 F.2d at 976 n. 4, intervened in the action for the purpose of seeking a rehearing. *Safir* v. *Gibson*, 432 F.2d 137, 145 (2 Cir.), *cert. denied*, 400 U.S. 942 (1970) (*Safir* II). Following another resort by Safir to the Eastern District and to this court, this time unsuccessful, see *Safir* v. *Blackwell*, 469 F.2d 1061 (1972), *cert. denied*, 414 U.S. 975 (1973), (*Safir* III), the Maritime Subsidy Board directed in 1973 that a total of $2,388,463.16 should be recovered from five AGAFBO lines that had been in direct competition with Sapphire. *Investigation of Alleged Section 810 Violation*, Maritime Subsidy Board S-243, 14 P&F Shipping Regul. Reptr. 77, 78 (1973). On a discretionary appeal to the Secretary of Commerce pursuant to 46 C.F.R. § 202.1 (¶ 6.01), the latter, by order dated September 9, 1974, re-

duced the amounts to a total of $1,126,522.26. The basis for this slash was what the Court of Appeals for the District of Columbia Circuit has called a "preemptory announcement" by the Secretary that "the record indicates that the United States Government actively induced the rate reductions here in issue," see *Safir* v. *Kreps*, 551 F.2d 447, 455 (D.C. Cir.), *cert. denied*, 46 U.S.L.W. 3215 (1977) (*Safir* IV).[1] When Safir complained to the courts of the inadequacy of the recovery, he was again opposed by the law officers of the Government. He was unsuccessful in the District Court for the District of Columbia, but the Court of Appeals, taking a different view, reversed and remanded with a direction that "the trial court should carefully scrutinize the evidentiary support for the Secretary's ruling and should, if necessary, remand the record to the Secretary for clarification of his reasons for interpreting the evidence as he has." 551 F.2d at 455.

With this frustrating background it is understandable that Safir should have decided the time had come to place the controversy in a posture where he, rather than Government officials, would control the prosecution. The instrument he chose was the "*qui tam*" statute which empowers any person to bring and carry on a suit on behalf of the government against anyone who has presented a claim against the United States for payment or approval, "knowing such claim to be false, fictitious, or fraudulent," 31 U.S.C. §§ 231 and 232.[2] His theory was that the steamship lines had submitted claims for subsidy, knowing that

1 It should be made clear that the Secretary who directed the reduction was Secretary Dent, not Secretary Kreps.

2 Safir had adverted to possible resort to a *qui tam* action in the 1972 proceedings before both the district court and this court, and had specifically mentioned the possibility of a later False Claims Act claim in an affidavit, see also *Safir* III, *supra*, 469 F.2d at 1063, but had not pursued this.

§ 810 of the Merchant Marine Act, 46 U.S.C. § 1227, and the corresponding clauses in their subsidy contracts made them ineligible for subsidies while they were charging rates which violated § 15 of the Shipping Act. Safir sought to invoke the *qui tam* statute in two ways: First, he filed an action against the steamship companies on May 25, 1977. After Safir had complied with the requirements of 31 U.S.C. § 232(C) with respect to advising the Attorney General of the pending action, the United States declined to enter the suit. Second, he moved to amend his 1968 complaint against government officials in which, as heretofore stated, the steamship lines had later intervened, so as to state a claim under the false claims statute,[3] and moved to consolidate the two actions. The steamship lines opposed the motion for leave to amend the 1968 complaint and moved for summary judgment with respect to the 1977 action. Judge Dooling denied Safir's motion for leave to amend and granted the defendants' motion for summary judgment, and these appeals followed.[4]

The judge stated his reasons for denying leave to amend as follows:

> While, as it would be amended, the complaint would in ultimate substance add a False Claims Act Count, that count does not arise out of the matter of original

3 The advantage of this course lay in the possibility of "relation back," F. R. Civ. P. 15(c), and consequent avoidance of serious difficulties with respect to the statute of limitations.

4 Defendants have not raised the claim that, as held in *United States* v. *Onan*, 190 F.2d 1, 6 (8 Cir.), *cert. denied*, 342 U.S. 869 (1951), a litigant cannot prosecute a *qui tam* action under 31 U.S.C. § 232 *pro se*. If we assume that such a claim would be well founded, the remedy would not be outright dismissal but a direction that the action be dismissed unless an attorney is retained. Compare *Phillips* v. *Tobin*, 548 F.2d 408, 415 (2 Cir. 1976) (stockholder's derivative action). At argument Mr. Safir expressed willingness to retain an attorney if either of the orders were reversed.

> complaint. The original complaint sought to compel public officers to do what plaintiff contended that it was their duty to do. The claim rested on the contrast between the FMC decision that the AGAFBO rates were unjustly discriminatory and the failure of the Maritime Administration, Maritime Subsidy Board, to take appropriate action in the light of 46 U.S.C. § 1227. The new matter would add a completely new claim both as to substantive content and as to the identity of the persons against whom relief was sought. Nothing in the original case turned on the knowing presentation of a false, fictitious or fraudulent claim. There is no basis for authorizing an amendment that would transform the case, in effect dismiss the original defendants, and pursue a completely different claim. *Cf. Rosenberg* v. *Martin*, 2d Cir. 1973, 478 F.2d 520, 526-27; *United States* v. *Templeton*, E.D. Tenn. 1961, 199 F.Supp. 179, 183-84.

We can find no sound basis for disagreeing with this analysis.

The grant of summary judgment for the defendants on the 1977 complaint was based on the clause in 31 U.S.C. § 232, added by the Act of December 23, 1943, 57 Stat. 608, which reads:

> The court shall have no jurisdiction to proceed with any [*qui tam*] suit whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought.

The judge concluded that the information which Safir had already furnished to Congressional committees, to the FMC, and to the Maritime Administrator in the course of his

long fight to have AGAFBO's predatory rates declared unlawful and to cause the government officials to recover illegally paid subsidies constituted the very evidence on which the action under the False Claims Act would depend.[5] Thus he had no need to consider the defendants' additional contentions that the 1977 action was time-barred and that their submission of subsidy claims could not be viewed as "false, fictitious or fraudulent" within the meaning of 31 U.S.C. § 231.

It is established that the "whenever it shall be made to appear" defense to a *qui tam* suit being prosecuted by the relator may be made not only by the United States but by a defendant. *United States ex rel. Leslie* v. *Potomac Electric Power Co.*, 208 F.2d 39, 41 (D.C. Cir. 1953); *United States* v. *Pittman*, 151 F.2d 851, 853 (5 Cir. 1945) (dictum), *cert. denied*, 328 U.S. 843 (1946). The leading court of appeals decision construing the clause, *United States and Aloff* v. *Aster*, 275 F.2d 281, 283 (3 Cir.), *cert. denied*, 364 U.S. 894 (1960), gives it a literal reading which supports the ruling by the district judge that knowledge by the government prior to suit bars the action, even if the plaintiff is the source of that knowledge. We, like others, see *United States ex rel. Vance* v. *Westinghouse Electric Corp.*, 363 F.Supp. 1038, 1041-42 (W.D. Pa. 1973); *United States ex rel. Davis* v. *Long's Drugs, Inc.*, 411 F.Supp. 1144, 1150-52 (S.D. Cal. 1976) (dictum), are not

5 The judge stated that the only new evidence alleged by Safir, excerpts from which were attached to his opinion, "related to a corrupt arrangement to frustrate plaintiff's endeavor to vindicate his claims" by a "deal" and concluded that this "is neither germane to the False Claims Act case nor to the Government's claims under 46 U.S.C. § 1227, nor is it material that was not in the possession of the Government since it professedly came from 'leaks' from the Watergate Special Prosecutor's office." Since we agree that the matter was not germane to the False Claims Act claim, we have no occasion to consider the correctness of the judge's two other propositions.

altogether happy with this approach, which extends the clause considerably beyond the evil sought to be remedied and gives it a broader effect than would be indicated by the legislative history reviewed by Judge Hastie in the district court decision, 176 F.Supp. 208, 209-10 (E.D. Pa. 1959), affirmed in *Aster*, and by Judge Knox in *Vance*, *supra*, 363 F.Supp. at 1041-42. Safir is at an opposite pole from the "mere busybody who copies a Government's indictment as his own complaint and who brings to light no frauds not already disclosed and no injury to the Treasury not already in process of vindication", described in the dissent of Mr. Justice Jackson in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 558 (1943), the case which inspired the 1943 amendments to the *qui tam* statute. Moreover, it seems rather curious that an informer who makes only a partial or merely conclusory disclosure to the United States before filing suit, should be free to carry on a *qui tam* action or to receive an award, 31 U.S.C. § 232(E)(1), if the United States elects to take over the prosecution, whereas the informer who has already furnished complete information should be barred from either. We have wondered whether some argument could be made for the plaintiff on the basis that no one in the Government had entertained any thought of pursuing the steamship companies under 31 U.S.C. § 231 which permits recovery not simply of any subsidies illegally paid but of "the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit." However, this would be true in almost any false claims suit which was not duplicative of one already filed or in course of preparation by the Government. Moreover, such an argument would still confront the obstacle that the false claims suit would be

"based upon evidence or information" already in the possession of the Government, and would have to face our decision in *United States ex rel. Greenberg* v. *Burmah Oil Co.*, 558 F.2d 43, 45-46 (2 Cir.), *cert. denied*, 46 U.S. L.W. 3357 (1977), see also *United States ex rel. Bayarsky* v. *Brooks*, 110 F.Supp. 175, 180 (D.N.J. 1953), *aff'd* 210 F.2d 257 (3 Cir. 1954); *United States ex rel. McCaus* v. *Armour & Co.*, 146 F.Supp. 546, 549 (D.D.C. 1956), *aff'd* 254 F.2d 90 (D.C. Cir.), *cert. denied*, 358 U.S. 834 (1958).

While a case may arise when the literalism of *Aster* would be so offensive to the intention of Congress as to demand a more liberal approach, we do not think this to be one. Despite his years of valiant effort, when all is said and done, Mr. Safir had three choices available to him in the late 1960's. He could have instituted a treble damage action on behalf of himself and his company for injury to business or property under the precise terms of § 810 of the Merchant Marine Act, 1936, 46 U.S.C. § 1227; he could, if he had thought of it, have withheld at least some information from the Government and brought a *qui tam* action under 31 U.S.C. §§ 231-232; or he could have done what he did, namely, endeavor to force the Maritime Administrator to take action to recover subsidies illegally paid. Under either of the first two courses, he would have been required to incur the complete burden of the expense of prosecution unless the Government elected to take over the *qui tam* action. Having opted for the third course and thereby involved the Government with the full expense of prosecution, he may not now bring a *qui tam* action on the basis of the same information he has already furnished.

The orders are affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - -X

MARSHALL P. SAFIR,

Plaintiff, :

v. 77 C 1093

AMERICAN EXPORT LINES, :
et al.,

Defendants.

- - - - - - - - - - - - - - - -X

MARSHALL P. SAFIR,

Plaintiff, : 68 C 643

v.

ROBERT W. BLACKWELL, : MEMORANDUM
et al., and
ORDER

Defendants. :

- - - - - - - - - - - - - - - -X

Appearances:

MARSHALL P. SAFIR, pro se

ELMER C. MADDY and KIRLIN CAMPBELL & KEATING, KOMINERS FORT, SCHLEFFER & BOYER, and KURRUS & ASH for American Export Lines, Lykes Bros. S.S. Co. and United States Lines

ROBERT T. BASSECHES and BARRETT, SMITH SCHAPIRO SIMON & ARMSTRONG, BERGSON, BORKLAND, MARGOLIS & ADLER, SHEA & GARDNER and FOLEY, HOAG & ELIOT for American President Lines, Farrell Lines, Prudential Lines, and PSS Steamship Co.

GILBERT S. FLEISHER and DAVID G. TRACEE,
United States Attorney

DOOLING, D.J.

The 1977 action was commenced on May 26, 1977, against the ocean carriers to enforce their alleged liability under 31 U.S.C. § 231 to the United States. The ground of liability asserted is that the carrier defendants, by reason of their participation in a practice discriminatory against Sapphire Steamship Lines, Inc., were not entitled to payment of any construction or operating differential subsidy (46 U.S.C. § 1227) but have nevertheless filed claims for and received payment of such subsidy amounts from the United States, and that those subsidy claims must be held to be false, fictitious or fraudulent. Plaintiff sues in reliance on Clause (B) of 31 U.S.C. § 232; that clause authorizes any person to bring a suite to recover the fraud damages and forfeiture provided in Section 231 "as well for himself as for the United States". Plaintiff has given to the United States the notice required by Section 232 (C), by supplying it with a copy of plaintiff's Petition for a Writ of Certiorari and Appendix in Safir v. Kreps as comprising plaintiff's "disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit." (The petition for writ was one of three addressed to the decision of the Court of Appeals for the District of Columbia

Circuit, reported 551 F.2d 447. The petitions were denied October 3, 1977.) The United States within sixty days thereafter declined in writing to enter the suit, saying that it had concluded from plaintiff's submission that the central issue of plaintiff's allegations in the present 1977 action "is presently being litigated in the United States District Court for the District of Columbia in an action styled" Marshall P. Safir, plaintiff, v. Juanita M. Kreps, et al, defendants, Civil Action No. 74-1474. Plaintiff, then, is free under Section 232(C) to pursue the suit unless there is a defect in the court's authority to proceed, for Section 232(C) provides, in part, that

> "The court shall have no jurisdiction to proceed with any such suit brought under clause (B) of this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought."

Section 235 provides that suits to enforce liability under Section 231

> "...shall be commenced within six years of the commission of the act, and not afterward."

In the period from March 29, 1965, until March 1, 1966, the Atlantic and Gulf American Flag Berth Operators (a "conference") had in effect rates for certain United States military cargoes which the Federal Maritime Commission (FMC) on December 12, 1967, held had been designed for the sole purpose of eliminating Sapphire Steamship from the carriage of military cargo by unfair competition; these rates the FMC characterized as so unreasonably low as to be detrimental to the commerce of the United States, contrary to the public interest, and, in consequence, violative of 46 U.S.C. § 814.* Counsel for plaintiff and Sapphire promptly drew the attention of the Federal Maritime Administration, Maritime Subsidy Board to the FMC decision and to the provisions of 46 U.S.C. § 1227, and demanded that action be taken to recover all subsidy payments made after March 29, 1965, and to cease making subsidy payments currently. No action having been taken by the Maritime Administration plaintiff, Sapphire Steamship Lines and Arnold Weissberger commenced an action in the Eastern District of New York , 68 C 643, on June 24, 1968, to compel the Maritime Administration, Maritime Subsidy Board and the Secretary of Commerce to cease making

*The decision was not appealed.

subsidy payments to AGAFBO members and to initiate suits to recover from them subsidy payments therefore made. The district court dismissed the complaint, but on appeal the Court of Appeals held that the Maritime Administrator could not refuse to proceed against the AGAFBO members without at least considering the interest of the victim and was at least required to make a considered decision whether to recover the subsidies paid in the past, and that plaintiff had standing to question the Administrator's failure to seek recovery of the subsidies paid during the period of violation. Safir v. Gibson, 2d Cir. 1969, 417 F.2d 972 (Safir I). A second appeal settled that, although current subsidies to the AGAFBO members would not be enjoined in the absence of a showing of violation of 46 U.S.C. §§ 814, 1227, the Maritime Administration was not to redetermine the issue whether the AGAFBO carriers' concerted action in reducing their rates to an unreasonably low level and holding them there for eleven months was unjustly discriminatory or unfair to Sapphire but was to give the FMC's determination the effect of collateral estoppel; the court noted that the Maritime Administration could investigate the nature and extent of individual carriers' participation in the illegal action if it found that relevant to its ultimate decision on whether to seek recovery of subsidies paid during the violation, and, if so, how much and from whom. Safir v. Gibson, 2d Cir. 1970, 432 F.2d 137 (Safir II).

The Maritime Administration, Maritime Subsidy Board, conducted a proceeding (No.S-243) before its Chief Hearing Examiner and a Recommended Decision rendered on April 24, 1972, would have fixed liabilities as follows:

American Export Isbrandtsen Lines	169,000.
Moore-McCormack Lines, Inc.	1,135,000.
United States Lines, Inc.	3,452,000.

Plaintiff was dissatisfied with the decision, and after an unrelated injunction matter had been disposed of (2d Cir. 1972, 469 F.2d 1061), the Maritime Subsidy Board of decisions of April 9 and October 10, 1973, fixed the liabilities at the following amounts.

American Export	$ 38,050.25
Bloomfield	121,893.67
Lykes	762,891.99
Mormac	386,776.56
United States Lines	1,061,704.76

Plaintiff sought to review the April 1973 decision of the Maritime Subsidy Board in the Court of Appeals for the Second Circuit, but by order of May 16, 1973, the application was denied. An appeal by the carriers to the Secretary of Commerce resulted in an order of September 9, 1974, adjusting the liability amounts "to reflect the effect of the United States Government action" in actively inducing the rate reductions in issue to its substantial financial benefit. The adjusted liabilities were:

American Export	$ 18,160.82
Bloomfield	46,346.54
Lykes	381,446.00
Mormac	193,276.76
United States Lines	487,292.14

Plaintiff sought review of the liability determinations in the United States District Court for the District of Columbia; that action was dismissed but, on appeal to the Court of Appeals for the District of Columbia Circuit, the dismissal was reversed and the case remanded to the District Court to try the issues, which the Court of Appeals outlined as including the propriety of the administrative action in mitigating the penalties assessed and reducing the subsidy recovery to reflect the proportion of military cargo carried "by the predatory lines", and as extending to the arbitrariness of the precise action taken, determining whether the various factors other than those cited as justifying mitigation can properly be considered and whether in light of all factors appropriate for consideration, the administrative action was arbitrary, capricious, or an abuse of discretion on all the facts developed in the hearing before the Administrative Law Judge (Chief Hearing Examiner); the Court of Appeals left determination of the applicable standards of review qualifiedly open for the district court to determine on remand but indicated the view that the Secretary's decision to mitigate on the basis he expressed appeared to reflect a failure to come to

grips with the difficulties in the evidence in the record, gave little assurance that his order resulted from a reasoned decisionmaking and might, upon the District Court's scrutiny of the record, show the necessity of a remand to the Secretary for a clarification of reasons. Safir v. Kreps, D.C.Cir. 1977, 551 F.2d 447.

1. Plaintiff moved on September 13, 1977, to amend the complaint in 68 C 643, which, as noted, sought to compel the Federal Maritime Administration, Maritime Subsidy Board, to stop paying subsidies to AGAFBO members and to recover from them any subsidies paid to them after March 25, 1965. The amendment would add a claim under 31 U.S.C. §§ 231 et seq., alleging, in addition to the earlier allegations of violations of 46 U.S.C. §§ 814, 817(b)(5) and 1227, and of consequent liability by virtue of 46 U.S.C.§1227 to refund past subsidies to the United States,

> that during the eleven months period of violation the carriers received over $ 227,000,000 of subsidies that in May 1971 after defendants were advised that a prima facie case of violation of Section 1227 had been made out, defendants continued to submit vouchers supporting claims for subsidies allocable to the eleven month period of violation knowing them to be false in that defendants, to their knowledge,

> were not entitled to subsidy payments while in violation of the provision of their subsidy agreements by which they agreed not to be parties to any agreement among carriers which is unjustly discriminatory or unfair to another American flag carrier, and defendants signed and submitted affidavits in support of their vouchers stating that they had fully complied with the subsidy agreement and regulations and were entitled to the payments requested, and submitted annual accountings asserting that they had complied with the terms of the subsidy agreement knowing that they had not done so.

Plaintiff argues that the amendment is proper and should relate back to the date the action was filed. Under Rule 15(a) plaintiff may amend only by leave of court, a leave that is to be freely granted when justice so requires; where amendment is allowable, the claim asserted relates back to the date of the original pleading provided that

> "... the claim ... arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading ..."

There is no reason to allow this closed case to be revived by amendment. The original complaint made no claim against any of the defendants. It did, however, clearly pray an adjudication that the making of any subsidy payments to the AGAFBO carriers during the violation months was illegal under 46 U.S.C. § 1227, that continuing subsidy payments to the AGAFBO carriers should be forbidden, and that the public officer defendants should be directed to sue the AGAFBO members to recover the subsidy payments illegally made to them. However, the AGAFBO parties intervened some time before June 18, 1970, after the decision of the Court of Appeals in Safir II, in order to petition for a rehearing (432 F.2d at 145), and after that date were heard in the further district court proceedings in 68 C 643. Plaintiff raised in the case as well as before the Chief Hearing Examiner his point that the United States should recover all the subsidies, and that, on some basis, he should participate in or benefit by the recovery, and in connection with plaintiff's motion by order to show cause of May 4, 1972, and the related appeal, there was discussion during oral argument on May 31, 1972, of plaintiff's possible qui tam interest and reference was made to the "False Claims Act" (31 U.S.C. §§ 2311 et seq.) in the context of Connecticut Action Now, Inc. v. Roberts Plating Co., Inc., 2d Cir. 1972, 457 F.2d 81; plaintiff's affidavit of August 21, 1972, submitted in the Court of Appeals plaintiff, asserted that he had been

actively concerned that the public officials take proper safeguards to protect the interest of the United States

> "... and his (plaintiff's) own in later action under 31 U.S.C. Sec. 231, 232, 233 & 235 after extent of these recovered are decided on."

Plaintiff presented, as an issue for the Court of Appeals to decide, the question of his "statutory interest under 31 U.S.C. Sec. 231-233, 235 in any forfeiture mandated by the violation of 46 U.S.C. Sec. 1227, Sec. 810 by the offending ocean carriers as Sec. 819 has been interpreted by (the Court of Appeals) decisions in Safir v. Gibson". Plaintiff argued in the affidavit, after quoting language from the brief before the Chief Hearing Examiner concerning the AGAFBO carriers' making the offending rate agreement despite the Section 810 compliance clause in the subsidy contracts, that

> "The deceit is obvious. The respondents unlawful behavior during that period violated both a clear provision in the subsidy agreement as well as an explicit statute and in presenting their claims for subsidy payments corresponding to that period the respondents received government monies to which they were not entitled.

> Moreover, in presenting the claims, the respondents were holding out that the provisions of Sec. 810 which are incorporated in the subsidy agreement had been complied with, in effect misrepresenting their compliance with its terms. Appellant in fact far exceeds the requirements of the doctrine in Marcus ... to justify his qui tam interest."

On this point, the Court of Appeals was clear (469 F.2d at 1063):

> "Plaintiff complains of a statement by the district judge that he would have no interest in any recovery by the Government. This statement was unnecessary to the decision and we have no occasion either to approve or to disapprove it."

The statement complained of was

> "Plaintiff argues that he may have an individual right to participate in any ultimate recovery by the Government under qui tam legislation. No statute authorizing a qui tam recovery or qui tam proceedings has been pointed to and the decision in Connecticut Action Now, Inc. v. Roberts Plating Company, Inc. ... makes it reasonably clear that the plaintiff has no qui tam interest in the Government's recovery

> under Section 810 of the Merchant Marine Act, 1936 as amended (46 U.S.C. § 1227)."

The motion to amend the complaint in 68 C 643 and to consolidate that action with 77 C 1093 must be denied. While, as it would be amended, the complaint would in ultimate substance add a False Claims Act Count, that count does not arise out of the matter of original complaint. The original complaint sought to compel public officers to do what plaintiff contended that it was their duty to do. The claim rested on the contrast between the FMC decision that the AGAFBO rates were unjustly discriminatory and the failure of the Maritime Administration, Maritime Subsidy Board, to take appropriate action in the light of 46 U.S.C. § 1227. The new matter would add a completely new claim both as to substantive content and as to the identity of the persons against whom relief was sought. Nothing in the original case turned on the knowing presentation of a false, fictitious or fraudulent claim. There is no basis for authorizing an amendment that would transform the case, in effect dismiss the original defendants, and pursue a completely different claim. Cf. Rosenberg v. Martin, 2d Cir. 1973, 478 F.2d 520, 526-527; United States v. Templeton, E.D. Tenn. 1961, 199 F.Supp. 179, 183-184.

2. By motions for summary judgment defendants challenge the False Claims Act complaint of 77 C 1093 on its merits.

Plaintiff's testimony was taken on September 28, 1977, with a view to determining what evidence or information he had communicated to the United States that was not already in its possession at the time of suit. He testified that he made available to the Government through the Maritime Administration Public Counsel in 1971 all the information that he then had to support the False Claims Act suit, 77 C 1093, and that he had not transmitted or offered any Government representative any new information since that time, none having been requested of him. Plaintiff said he did have information to bring forward at the present time, based on the fact that the case, 77 C 1093, had been filed. Annex A sets forth the relevant parts of the testimony that he then gave about the content of the new disclosures to him. The new material, related to a corrupt arrangement to frustrate plaintiff's endeavor to vindicate his claims, is neither germane to the Flase Claims Act case nor to the Government's claims under 46 U.S.C. § 1227, nor is it material that was not in the possession of the Government since it professedly came from "leaks" from the Watergate Special Prosecutor's office.

It is unanswerably clear that the Government had in its possession all the evidence and information upon which plaintiff's False Claims Act suit is based at the time such suit was brought. Within ten days after the offending rates were put in effect plaintiff made a twelve page statement to the Joint Economic Committee, Subcommittee on Federal Procurement and Regulation, in the course of its hearing on Discriminatory Ocean Freight Rates and Balance of Payments, describing in considerable detail, under the questioning of Senator Douglas, the AGAFBO "fighting rates" adopted "in an effort to drive non-AGAFBO members out of business." Specific reference was made to the fact that certain AGAFBO carriers were subsidized and Sapphire was not; the subcommittee was advised that "the Managing Director has been in touch with Sapphire on the matter and is attempting to collect data on this rate with a view toward possible investigation of it." In a May 1966 communication to the same sub-committee plaintiff asserted that "American subsidized lines should be denied sub- sidy on that portion of their cargoes for which no foreign flag competition exists." In March 1971 plaintiff presented to the Merchant Marine Subcommittee considering S.1220 (a bill that would have authorized certain appropriations) that it should not authorize appropriations to be disbursed without the considered decision mandated by the decisions of the Court of Appeals for the Second Circuit and provoked Senator Hatfield to inquire

whether it would not be more appropriate to bring court action on the question of the disbursement of the funds.

These disclosures, to which must be added those incident to the proceedings before the Maritime Subsidy Board, the present district court, the Courts of Appeals of the Second and of the District of Columbia Circuits and the United States District Court for the District of Columbia, and the material underlying the original Federal Maritime Commission decision on the rates, presented to the Government all the information and evidence bearing on the issues save for the matter of directing the Government to the contention that for the AGAFBO members to have filed claims for subsidy payments while they were operating in violation of Section 810 (46 U.S.C. § 1227) or in respect of the period during which they were operating in violation of the section was arguably to have filed claims "knowing such claim(s) to be false, fictitious or fradulent" or claims which were supported by vouchers known "to contain any fradulent or fictitious statement or entry." But even that very contention was laid before the Government with explicit reference to the False Claims Act in the August 21, 1972, affidavit in the Court of Appeals.

The Government, then, was on May 26, 1977, when suit was started, in possession of the evidence and information upon which the suit is based. It is equally probable that a great deal of the information and evidence possessed by the Government, and much of the impetus to action, derived from plaintiff.

That plaintiff is the source of a substantial part of the evidence and information that was in the Government's possession does not authorize continuance of the action. United States and Aloff v. Aster, 3rd Cir. 1960, 275 F.2d 281, affirming Judge Hastie's decision, E.D.Pa. 1959, 176 F. Supp. 208, make clear that Section 232 prohibits "any qui tam action based on information already in the possession of the United States, regardless of the source from which that information has come." The present case, one in which plaintiff in substance directs the Government's attention to its possible rights under Section 231 as applied to the facts brought out in the Federal Maritime Commission and the Maritime Subsidy Board proceedings, resembles United States v. Armour & Co., D.C. 1956, 146 F. Supp. 546, aff'd, D.C. Cir. 1958, 254 F.2d 90. The Aster case was followed in United States ex rel. Vance v. Westinghouse Electric Corp., W.D.Pa. 1973, 363 F.Supp. 1038, 1042, with an intimation of reluctance. United States ex rel. Davis v. Long's Drugs, inc., S.D. Cal. 1976, 411 F.Supp. 1144, held that Medicaid

claims presented to the states were within the False Claims Act, but that the facts in the possession of the state in question should not be considered facts in the possession of the United States for Section 232 (C) purposes. However, the court in Long's Drugs expressed "serious reservations" about the validity of Aster. The court considered that the clause in Section 232(C) was intended to deny the right to sue only to parasitical suitors who had derived their facts from the public record of the Government's own investigations and was not meant to exclude those who voluntarily furnished information to the Government before starting suit upon the Government's failure to do so. That, the court considered, flowed from the liberal interpretation of the Act adopted in United States v. Neifert-White Co., 1968, 390 U. S. 228. But Neifert-White was liberal in reading the statute as embracing a wide range of Government interests, and throws no light on the Court's attitude toward the clause in Section 232(C). And the statute itself answers the serious reservation of Long's Drugs about the validity of Aster. Under Section 232(E)(2) if the United States rejects the suit and the plaintiff presses it to a conclusion, the plaintiff may receive up to one-fourth of the recovery as "fair and reasonable compensation ... for the collection of any forfeiture and damages", plus the reasonable costs and expenses of suit. If the United States comes in and takes the suit over, however, then

under Section 232(E)(1) the court may award the original suitor "an amount which in the judgment of the court is fair and reasonable compensation to such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought." The award may not exceed one-tenth of the recovery. These provisions have taken the place of the older provision, Section 6 of the Act of March 2, 1763,2 Stat. 698, (Revised Statutes § 3493) which gave the private suitor one-half the damages and forfeitures that he should "recover and collect" as well as the costs of the suit. The older statute gave the United States neither a right to notice of the suit's pendency, nor a right of intervention in it; its sole right was to one-half the recovery and the power to veto a withdrawal or discontinuance of the suit. See Bush v. United States, C.C. Oreg. 1882, 13 Fed. 625, 629; United States v. Griswold, D.Oreg., 1885, 24 Fed. 361,366, aff'd, C.C.Oreg. 1887, 30 Fed. 762. In United States ex rel. Marcus v. Hess, 1943, 317 U.S. 537, the United States appeared only as amicus curiae, at the request of the Court (317 U.S. at 545). Under the present statue the United States is given control of the suit at its option, and it may altogether exclude the private suitor from participation in the conduct of the case. The emphasis is on limiting the informer's award precisely to what he adds to the store of information and evidence that was in the Government's possession when the suit was started.

That the private suitor, in the pursuit of his own interest and to secure a relief that he could obtain only through the Government, may have disclosed facts and evidence to the Government that arguably might also arm it to pursue a Section 231 claim against the defendants, does not create an exception to the provisions of Section 232(C), no in principle should it. Plaintiff's submissions of evidence to the Federal Maritime Commission, to the Maritime Subsidy Board and to the Senate Subcommittees were directed to specific substantive reliefs to which plaintiff claimed entitlement for Sapphire and for himself by reason of his interest in Sapphire and its business. But the submissions were thereafter in the Government's possession for all purposes, including its determining from them the measure of its own rights, and what relief it would seek in its own considered judgment.

Since so much of Section 232(C) as deals with the effect of the Government's prior possession of the evidence and information on which the suit is based is treated as strictly jurisdictional, United States (by Greenberg) v. The Burmah Oil Co. Ltd., 2d Cir. 1977, 558 F. 2d 43, 46, it follows that the action must be dismissed. In the circumstances it would not be proper to pass on the questions of fraud and of limitations presented by defendants.

It is

ORDERED that the motions of defendants for summary judgment in 77 C 1093 are granted, and the motion of plaintiff to amend the complaint in 68 C 643 and to consolidate that action with 77 C 1093 is denied; and it is further

ORDERED that the Clerk enter judgment that plaintiff take nothing in 77 C 1093 and that the action is dismissed for want of jurisdiction.

Brooklyn, New York

December 20, 1977. /s/ D.J. Dooling
U. S. D. J.

ANNEX A

employee or representative of the government?

A I have offered it. It has not been requested of me.

Q Will you tell us what you have offered to them?

A Well, I haven't offered anything specific to them. I have information which now based on the fact that this case is filed will be brought forward.

Q I now ask you to give us the information which you intend to bring forward.

A Well, upon information and belief, at some time in 1968 an arrangement was made between members of this group and the then Republican Party for the consideration of a considerable sum of money, to see to it that the subsidies which formed the basis of a complaint filed in 1968, in June that that case, if the Republican Party was elected to office, would be made difficult for the plaintiff to succeed.

Q May I ask you whether you have any documents to support this arrangement that the Republican Party had?

A I have no documents, but I have -- that my information came from -- I will put it this way. It came in 1973, about October of 1973, by a telephone call from a newspaper reporter who asked me whether I knew anything about a deal involving approximately $7,000,000 in which --

and he mentioned by name one Spyros Skouras, Senior, had through someone in the Republican Party -- and I am not sure whether it was Mr. Stans that he mentioned by name or not -- had arranged for this $7,000,000 to be paid over, over a period of time, to parties within the Republican Party for the purpose of settling or disposing of the anti-trust case which was then filed by the Trustee in Bankruptcy of Safir Steamship Lines, and also my case, which at that time was in the nature of mandamus and which was the original action that I filed in 1968.

Q Could you tell me the name of the newspaper reporter?

A The name of the newspaper reporter was -- his name was Louis Kohlmeyer, and I understand that he is a Pulitzer prize winning reporter who worked for the Wall Street Journal at the time I first knew him, and at the time he called to inquire about my information, about this information, was working for the Chicago Sun Times syndicate in Washington.

I told him at that time that like a husband whose wife was cheating, I would be the last to know the answer to his question, as to whether I had any information on the subject. My answer to him was no, but from that point on I knew that there would be a point in this

50a
Safir

litigation when under a False Claims Act amendment, in one case or in a new case filed as this one is here, that we are here today, filed last May, that new information would be supplied to the government in order to firm up the specific intent to defraud, which I felt as far as my case was concerned, this form of contribution would represent.

Q You say this inquiry was in 1973?

A Yes, sir.

Q Did you ever tell anyone in the government about the inquiry?

A No.

Q Why didn't you tell them?

A Because at that time I had no proof, and I had no basis on which to act, except and distinct from perhaps a Special Prosecutor's office and others who were interested at that time.

Mr. Kohlmeyer mentioned, however, if this will be helpful to you, Mr. Fort, and it might be, that certain of this information that he was basing his call to me on was based on leaks from the Special Prosecutor's investigation in the Nixon impeachment case. Make the most of it.

Q So that what you are saying is that the

51a
Safir

information in essence was in the possession of the government at the time he called you, because he had heard about it through leaks from the Special Prosecutor?

A If you think so. As I said, make the most of it. I don't think so. I don't think that that could be considered in the hands of the Attorney General, Department of Justice, since they were not involved in the Special Prosecutor's office.

Q Were any other companies mentioned by this reporter?

A Not by name.

Q Now, return to the affidavit, Mr. Safir.

A Yes.

Q Paragraph 5, Page 7.

A I seem to have a problem there, Mr. Fort. Paragraph 5?

Q Five begins on Page 6 and it goes on to Page 7.

A I beg your pardon. Go right ahead, sir.

52a 9 cont.

Safir

Q I would like to read you a sentence from that paragraph, starting off with "Thus, the conduct and transactions which were in issue before the Maritime Subsidy Board, as a result of the 1968 complaint and are now res judicata, are the same as which formed the basis for the proposed amended complaint."

53a

Safir

I did, and there was no answer and then he called me back at home.

Q Mr. Kohlmeyer?

A Yes. Now, I think I tried to get him back at the Wall Street Journal, but he wasn't there and then he called me and he told me that he was no longer with the Journal, but with the Sun Times Syndicate.

Q Do you remember what time of day you were called by Mr. Kohlmeyer?

A I think it was late afternoon.

Q Where was your office at this time?

A No, he called me back at home.

Q What office did he call?

A He called the office at 41 Flatbush Avenue, Brooklyn.

Q And where were you living at that time?

A I was living in 8 Southview Lane in Kingspoint, New York. So there was a relay of calls from my office to my home.

54a

Safir

Q What are you using to place -- what information are you using to place the date of the call some time in September or October of 1973?

A My own memory. Just my recall because of the nature of what was going on at that time, the events

55a

Safir

of the time and the timing of his statement that leaks are coming out of the Watergate Hearings and he went further, he went further on this thing, I haven't told you all that he told me.

Q Before we get into the actual conversation, I am just going for information that -- the information which you base your memory of the date of the conversation.

A I did not quite finish that question. I based it on the fact that the Watergate Hearings were on, that as a special prosecutor -- no, I wasn't even sure of that, that the Maritime, the head of the Maritime Commission had been called by the Watergate Committee.

He said at that time or a few days prior to that, Helen Bentley by name had been called by the Watergate Committee, so I placed the timing to be more accurate, perhaps others can too, to place it about the time that she was called before the Watergate Hearings.

Q So the conversation was after she had testified?

A After she testified and certain newspaper type leaks had emanated.

Q How did the conversation begin, who spoke first?

A He did. He said, do you remember me, I

said, of course I remember you.

Q Could you give us the rest of the conversation as you remember it?

A Then he started to ask me questions. In fact, he said, have you felt that you are having a very difficult time in making progress on your case and I said, I sure have felt it.

Q What was your understanding of what he meant by your case?

A The case that I was pursuing in the Maritime Subsidy Board, S 243, which was the outcome of my initial action in 68 C 643 in the Eastern District of New York.

Q He asked you a question and you responded. Was that your only response to the question?

A Yes. I said, why do you ask. That was my next question.

Q What was his response?

A He said, well, we are getting words and I am quoting now on the basis of a conversation of six years ago, so there is some license or liberty involved.

Q Is it six years or four years ago?

A Excuse me, '73 is four years ago. I was thinking of the first one. Anyway, in connection with the one of four years ago, I asked him, why do you ask

and he said, because there are cer- tain things emanating from the Watergate Hearings that show a relationship between your case and certain things that have happened in regard to campaign contributions and things like that.

He said, do you know of a payoff to Nixon at that time, he said, in the neighborhood of five and a half million dollars. I said, unheard of and I said, I would be the last to know if that were the case, because I mentioned in connection with being like a cuckolded husband, always being the last to know.

He said, did I see any relationship between the City of Baltimore and the problems I was having. I said, no. I said, why do you bring that up. He said, well, isn't it interesting to you that Andrew Gibson and Helen Bentley and also the Vice President of the United States comes from Baltimore.

I said, well, I cannot see what the relationship is. He said, well, there is evidence involved which we are hearing about that connects a payoff of this five and a half million dollars on your case, to the relationship of Andrew Gibson, who was a vice president of Prudential Grace Lines, and an employee of Skouras coming into the administration as the Maritime Administrator. A relationship between Helen Bentley,

a Baltimore reporter, becoming the head of the Federal Maritime Commission and the vice president.

So, I said, I still cannot see the relationship between the vice president and these people. He said, well, Skouras is a Greek. I said, that is right, or Greek extraction. He said, well, we hear it down here and this is what he said, that for the money that he paid into the Nixon administration to buy your case and the problems that you are having, he additionally recommended to Nixon at the time that he would like if his Greek-American compatriot becomes the vice president of the United States for the same five and a half million dollars.

I said, I find that very hard to believe, but that is a lot and if the next time I am in Washington, I will be very glad to discuss this thing further and I did. I came down to Washington soon thereafter. I came down, I called him up and I met him in his office at this National Press Building.

Q Are we going onto another conversation?

A Yes. We are going onto another conversation.

Q All right. Let's go back to the telephone call to you. Did Mr. Kohlmeyer tell you where he had gotten this information?

Safir

A No, he did not.

Q Did he indicate that he had gotten it from the testimony at the hearings?

A No, he did not. He indicated that it came in the form of a leak.

Q From --

A From one of the bureaus, apparently some agency, apparently the special prosecutor or the Ervin Committe at the time. I don't know, but it was a kind of a leak thing that he was trying to check out, as to whether I knew anything about it.

Q You mentioned that he was using the pronoun, we have gotten this information.

Do you know if he was working with anyone else in this investigation?

A I don't know.

Q Did he mention any other reporter's name?

A He did not.

Q Did he tell you when Mr. Skouras had been in contact with Mr. Nixon?

Safir

A He did not.

Q Did he mention any dates --

A Well, there is a determining factor in that, because Mr. Skouras died soon after Nixon came

62a

Safir

magnificant sum out in order to presumably settle the antitrust case, and see to it that the subsidies not be withheld from the lines, from the steamship lines, who were then receiving them and who were apparently guilty of the violation.

Q Have you had any contacts with Mr. Kohlmeyer since your October or September, 1973 telephone conversation?

A Yes. I mentioned the fact that I visited with him a month or two or three thereafter.

Q Do you remember if it was in 1973 or 1974?

A It might have been in early '74. I told him, I told you that he had an office, he was in this little office all by himself in that building.

Q What building is that?

A National Press Building. Apparently he was a pipe smoker, because the room smelled like a gas bin. You could not breathe in it.

I said, look, I am prepared to cooperate and help you on this thing, if you want some help. I am surprised that you hadn't gotten back to me earlier.

63a

Safir

He had nothing much to say. He looked like he was unhappy with the whole conversation, and perhaps he shouldn't have called me in the first place.

So at that point I decided that was the end

of it, at least for then, and I certainly -- I had nothing further to go on. Everybody and his brother was investigating everybody else at that particular time, and I had my own problems, most of which were based on the ongoing fight with you people.

So I did nothing further about it.

Q Had you initiated this meeting?

A The second meeting, yes, it was me.

Q And do you remember what Mr. Kohlmeyer said?

A He said he would think about going further with it, and that he would get in touch with me, which he never did.

Q Did he ask you any additional questions?

A Not a one.

Q Did he give you any additional information?

A I don't recall.

Q Did he give you any documents?

A No.

Q Do you remember him giving you any more details or mentioning any names?

A I said no. He was reluctant to, from being practically garrulous in the telephone conversation, he was very reluctant to do any talking on that visit.

Q Do you remember how long this second meeting

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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SAFIR,

Plaintiff, :

-against- : 77-C-1093

AMERICAN EXPORT LINES, :

Defendant. :

----------X

x

SAFIR,

Plaintiff, :

-against- : 68-C-643

BLACKWELL, :

Defendant. :

----------X

United States Courthouse
Brooklyn, New York

October 28, 1977
5:00 o'clock P.M.

B e f o r e :

HONORABLE JOHN F. DOOLING, JR., U.S.D.J.

PERRY AUERBACH
ACTING OFFICIAL COURT REPORTER

P. 2.

Appearances:

MR. MARSHALL SAFIR, PRO SE

GILBERT FLEISCHER, ESQ.
U. S. Government

ELMER MADDY, ESQ.
Attorney for Trade-Line Defendants

ROBERT T. BASSECHES, ESQ.
Attorney for Non-Trade-Line
Defendants, et al.

would hope that if, as I hope in the case you rule in our favor, that that would be dispositive of that element of the case as well. Thank you, your Honor.

MR. SAFIR: Your Honor, in Paragraph 11 of Trade Defendant's statement of material facts as to which there could be no issue --

THE COURT: Trade Defendants?

MR. SAFIR: Trade, and I'll say non-trade as well -- (Pause.) All the trade defendants

THE COURT: I have a separate stating.

MR. SAFIR: Let's take the trade first.

In Paragraph 11 of the Trade Defendant's statement of material facts, as to which there could be no issue, there is a misstatement of facts, of paramount significance. This affiant never admitted that the subject matter of the Colemire conversations is improbable in its judgment. What the transcript states, Page 40, Line 13 is as follows: "I felt the whole conversation --

THE COURT: Let me turn to it.

(Pause.) All right.

MR. SAFIR: "I felt the whole conversation at the time was bizarre anyway, and it was highly improbable. It still does."

A re-hearing of the tape made during the deposition further clarifies the sentence, wherein I clearly stated that it "sounded highly improbable." Not that it was highly improbable.

I have a copy of the tape with me, your Honor, and as it happens it fits this little machine here, so that I could leave it with the Court rather than try to figure out the exact point in the tape where this comes forward. But on oath, the word "sounded" is in there. In other words, the purpose of bringing this to the Court's attention is to inform the Court that I believe that the Colemire information was factual. I believe that the Defendants entered into an agreement with Richard Nixon and certain officials of his campaign in 1968 prior to the election; that in the event of an election Nixon would, for the gross contribiton of 7 million dollars, protect and defend the interests of the subsidized line defendants, the first by protecting the lines from jeopardy of a 250 million dollar subsidy recovery; and second, by ordering the Justice Department to agree to a settlement of the case of Safir Steamship Lines versus AGAFBO, for the Government creditors' obligations alone, and that was the sum of approximately 1 million 600 thousand dollars. Whether the remainder of the 7 million dollars would go to the campaign coffers of the 1972 election or be siphoned off for other purposes is not yet known. That the Court of Appeals decision, and this I believe, too, in Safir-1, the 1969 decision, seriously compromised the original plan that these people had; and

Safir-2, which was the one where the collateral estoppel effect was decided by the Court, further impaired that scheme's viability. That when the procurium decision in Safir--we'll call Safir-2a took place, this opened the door to investigation of quote, and this was the quote in the decision, "that the Government had a right to determination in S-243 whether a wider conspiracy existed."

But this was used by the Nixon Administration through Secretary Stans in the Department of Commerce for a multi-year delay in the investigation to protect these lines from the finding of violation, and to protect the ability of the lines to accrue the 5.6 million dollar obligations that they took on with Nixon by their continued collection of Government subsidy payments;

That when the anti-trust -- Safir Anti-trust Case as a result of the Second Circuit's decision in Safir's 2 and 2a, the creditors of the bankrupt opposed the million six settlement offer which would have denied any recovery to them. The Department of Justice reduced, and this was -- this is in the record -- to $795 thousand dollars, the amount that would be acceptable to the creditor, United States, if the creditors, the Trade creditors would settle for a new offer which would give all creditors and the trustees and -- as counsel -- the sum of two million four. The referee accepted this proposal, the second proposal, and it was approved by the District Court of the District of Columbia in the antitrust case.

The Department of Justice since Nixon's resignation disowned the Nixon Administration agreement to reduce its claim. The 2.4 million settlement leaves open the question of the collection and disposal of the remaining 4.6 million dollar payoff, since the 2.4 million dollars is undoubtedly traceable, to appropriate entries on the books of these defendants. It is in the area of this remaining fund that investigation and discovery will be helpful in '77 C 1093.

MR. SAFIR: (continuing) Now that the recent Supreme Court decision on the Nixon tapes for civil actions becomes -- I'll put it this way -- the recent decision makes the ability to get --

THE COURT: Makes them available.

MR. SAFIR: Makes them available. This is a significant development. Plaintiffs contend in passing that Nixon lived down (up to) his obligation to these defendants as long as he was in office. It was not until after Nixon resigned in August 1974 that on September 5, 1974, just a month later, the Secretary of Commerce, then Dent by name, was free to file his order confirming the violation itself. Even then, the order was tainted by the unsupported charge that Federal officials of the Department of Defense induced the illegal action to attempt to apply the doctrine of collateral estoppel -- excuse me, not the doctrine of collateral estoppel -- the doctrine of estoppel to the Government's recovery under Section 810, or alternatively under the False Claims Act, and handicapped the Department of Justice under a new administration from providing, under the False Claims

Act, the ability to pursue False Claims action, because the Government's hands were not clean.

By the way, this last approach that took place in the order of the Secretary in 1974, that the blaming the Department of Defense officials in 1965, was rejected by Judge Wright in his decision last February. Therefore, either on a denial of the defendant's motion for summary judgment or on a grant of a continuance to this plaintiff to complete his basic discovery prior to taking on, on your part, the decision on the motion for summary judgment, I'll require several subpoenas:

A subpoena to the General Service Administration for those Nixon tapes during the period, May 15th to June 15th, 1969; the time at or about the first Safir decision in the Court of Appeals, wherein, to be specific, the name S-A-P-P-H-I-R-E or Sapphire, my name, or William Sapphire, my borhter's name or Skouras, S-K-O-R-A-S or Spiros Skouras or Spiros or the word "Fair Star" or Gem Stone would appear.

THE COURT: Those were the vessels?

MR. SAFIR: There was a vessel called the S.S. FAIR STAR that was not one of my vessels, but it was a vessel which may have a bearing on this case.

The name Arthur Becker might also be added to the subpeona. The Nixon tape list, if such a name appears in connection with a Maritime conversation.

Second, I would need any record of White House calls to the home of Marshall Sapphire (sic) by John Erlichmann, collect or paid, for the months of June and July of 1970 and 1971; and those Nixon tapes immediately preceding and following such calls.

Four, I would need a subpeona duces tecum for one Arthur Becker, Esquire, of Washington, D.C., with his diary for the dates of June 1st, 2nd and 3rd, 1969, and all records in his possession of a transaction concerning the refurbishing of the troop ship S.S. FAIR STAR in September and October 1968.

Number five, a subpoena for the guest record for the Regency Hotel of New York for the dates of June 1st, 2nd and 3rd, 1969; and paragraph six, a subpoena duces tecum for Spiros Skouras, president of Prudential Lines, with his diaries of August through October 1968. The records of Prudential Lines are either travel arrangements for Mr. Skouras or his late father during that period, and diary and appointment records of his late father for that period, if such were available, if such are in existence, rather.

I would also need the cash disbursements and accounts payable records of Prudential Lines for the years 1968, '69, '70, ;71 and '72 and also those for the Prudential Grace Lines (pause) for a start. The records for the other lines would follow.

Now, the reason I asked for such an in depth and for such a serious thing, your Honor, is that most normal people, most Americans would consider it bizarre. They would have considered it bizarre until 1973 in Watergate for any person, lawyer or layman, to get up and make such statements and say he believes them about the President of the United States. And so, it was bizarre when I heard this conversation of Colemire to me. But it's no longer bizarre, and it's no longer improbable.

When you look at the history of this, the clients at this table -- the clients of these people at this table, and the recent history as to the bribes, payoffs, indictments of Federal officials that have been involved in the last few months, the general smelly aura of this whole industry, there has to be a time when somebody who has a stake, as I have, and not just an ordinary citizen's desire to do good, but a monetary stake, takes the position and goes all the way, and am prepared to go all the way on this case.

A dismissal of 77-C-1093 at this stage, and prior to discovery would be a miscarriage of justice.

MR. SAFIR: (continuing) What little law I know, and I pick up occasionally from my son who went to Yale Law School, he's in Washington, and I still get the Yale Law School books at my home where he used to get them, so I avidly read as I go along, and in March '74 there was an article on Federal Summary Judgment Doctrine, "a critical analysis" by one Martin B. Lewy, (sic) and on page 767, and in answer to Mr. Basseches', there is an

article about excusing an insufficient response, and it has to do with sometimes the opposing party cannot make a sufficient response because the affidavits and other supporting materials available to him do not represent a realistic preview of the evidence you will be able to present at trial. I don't have to read any more to you. You probably wrote it.

Anyway, my feelings about it are, that I must be given the opportunity to pursue this to its conclusion. The tools are available now. The Supreme Court has put them in our hands. I ask that the motion to dismiss or for summary judgment be denied, and that the subpoenas issued that I've requested. Thank you.

MR. MADDY: Mr. Safir seems to be suggesting or is suggesting that he be given the chance to do further discovery before your Honor rules on the motion for summary judgment, or he be given this opportunity, but I don't think that's appropriate under -- when he files his qui-tam's action.

The basis of the claim is that there was a false claim filed, and all of these other suspicions that Mr. Safir may have for various reasons is unsupported. He didn't have any information when we took his deposition. I don't think he should be given leave to go out and just take all these depositions. There's no -- there doesn't seem to be any possible relevance of those matters to the question of whether or not a false claim was filed with respect to thses particular subsidy vouchers. They may have interest for

other reasons, but they have no bearing on the question on filing a false claim.

Also, with respect to the way the deposition reads, I think we fairly quoted or referred to what the deposition said, and Mr. Safir signed it and swore to it. So we rest upon what's in that deposition, and not what Mr. Safir may say now when he seems to, in effect, seems to be changing his testimony given on that day.

THE COURT: No, he said he had it on tape.

MR. MADDY: Yes, your Honor. I must say we were basing it upon his sworn -- signed and sworn to deposition.

MR. SAFIR: I have the tape, your Honor, if I may interject, and to put it in the custody of the Court, where on side number 2, halfway through, the word "sounded" is the word, the word that was in the sentence. Can I leave this with Mr. Bachman?

THE COURT: Yes.

MR. SAFIR: Thank you.

THE COURT: Well, I will reserve decision on it. I don't think that I could at this time authorize the taking of depositions on the scale indicated before dealing with the papers that are now before me, because in a way, that taking would be more formidable than the case itself.

If in attempting to decide this I find that it cannot fairly be decided one way or the other without such further discovery, then I will act at that time.

MR. MADDY: Your Honor, we received Mr. Safir's papers yesterday. Could we have a short period of time to file a response thereto?

THE COURT: You received some of his papers yesterday?

MR. MADDY: Well, we got his latest version.

THE COURT: All right, yes, I see it is October 27th. Very well.

MR. MADDY: By next Friday then?

THE COURT: Yes.

MR. MADDY: Thank you.

MR. BASSECHES: Excuse me, your Honor, I mentioned a case which my colleague, Mr. Lewis, cautioned me to -- I don't know whether it's relevant or not, but let me put it in the record. The case is United States v. Borin, B-O-R-I-N.

THE COURT: That's in the briefs.

MR. BASSECHES: Right. That is cited in the briefs. That does address the issue of fraudulent concealment with respect to the Statute of Limitations.

THE COURT: Thank you, gentlemen.

(Whereupon Court stood in recess for the day.)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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MARSHALL P. SAFIR, Pro Se, and on Behalf of the United States of America,

Plaintiff

-against-

AMERICAN EXPORT LINES
AMERICAN PRESIDENT LINES
LYKES BROS. STEAMSHIP CO., INC.
MOORE McCORMACK LINES, Incorporated
UNITED STATES LINES, INC.
FARRELL LINES, INC.
BLOOMFIELD STEAMSHIP CO.
PRUDENTIAL GRACE LINES, INC.
PRUDENTIAL STEAMSHIP CO., INC.,

Defendants

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Affidavit and Complaint

77c1093

MARSHALL P. SAFIR, Plaintiff, Pro Se, on this 26th day of May, 1977, having been duly sworn, deposes and says:

I. I am a citizen of the United States and of the State of New York who, in the year 1965, brought to the attention of the Joint Economic Committee of the Congress certain illegal concerted actions by these defendants. The Chairman, Senator Paul Douglas, after an open hearing then referred the matter to the Federal Maritime Commission for investigation.

The FMC then instituted a lengthy investigation (Docket 65-13)*, which culminated in a finding that these subsidized ocean carriers, acting in concert with others, violated Sec. 15 of the Shipping Act of 1916. This finding, inter alia, was incorporated in the FMC decision dated December 11, 1967.

Soon thereafter, this plaintiff filed an action in the nature of mandamus in this District (68c643) to compel the Secretary of Commerce to cease subsidy payments to the violators of Sec. 15 of the Shipping Act and to recover payments made to the violators since the violation on the theory that collateral estoppel existed between Sec. 15 of the Shipping Act and Sec. 810 of the Merchant Marine Act of 1936 in regard to the subsidized carriers. The history of the case from 1968 to 1977 is spelled out in detail in attachments A and B.

The seminal action, however, was brought in this District. All of the defendant violators intervened as defendants here before the learned Judge Dooling and all of these carriers, with one exception,[1] continue to transact business here.

Briefly, these ocean carriers were found to have violated Sec. 810 of the Merchant Marine Act (46 USC 1227) by the Mari-

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* Docket 65-13 Rates on Government Cargo 11FMC263-287 (1967)

[1] Bloomfield Steamship Company discontinued operations in 1966

time Administration in April 1973[2] and later on review by the Secretary of Commerce in September 1974[3] in hearings mandated by the Court of Appeals of this Second Circuit. The plaintiff alleges that this finding is now res judicata.

II. This Court has jurisdiction under 28 USC 1331, 1337 and 1651 and 31 USC 232. Venue is proper, pursuant to 28 USC Sec. 1391.

III. The statutes involved here are Title 46 USC 1227 and Title 31 USC 231, 232, 233, 235.

IV. On May 26, 1971, the Congress of the United States appropriated under the Second Supplemental Appropriation Act 1971 (PL92-18) the sum of $80,000,000 to liquidate past due obligations and about half $40,300,000 was appropriated to liquidate, in final part, unpaid ship operation subsidies for the calendar year 1968 and earlier years, the payment of which had been delayed by disagreements over subsidy amounts due the carriers. The sum of $43,150,521.84 was disbursed on and between May 27, 1971 and June 11, 1971 when disbursement was arrested pending decision on a motion by this plaintiff for an injuction against payment of these funds.

V. On June, 1971, Judge John Dooling of this Court, issued an order enjoining the payment of operating differential subsidy

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[2] See Attachment B, page 104a to 176a.

[3] See Attachment B, page 56a to 58a.

funds to the above-named defendants pending the outcome of a fact-finding investigation by the Department of Commerce as to whether Sec. 810 of the Merchant Marine Act of 1936 had been violated by these defendants. (See Memorandum Incorporating Finding of Fact and Order dated June 23, 1971, page 184A of Attachment B herein.)

The significance of the dates commencing with May 27, 1971 in regard to subsidy payments made for the offending period in 1965-1966 must be emphasized here. The payments in May and June of 1971 were explained by Judge Dooling, as follows:

> "The entire $40,300,000 appropriated to pay past-accrued but unliquidated subsidies is made up not of basic current operating differential subsidies, which are generally disbursed as earned more or less currently to the extent of about 90% to 95% of the amount ultimately determined to be due, but with the held back amounts consisting of balance amounts due only when finally determined and agreed on between the carrier and the administration."

In short, the statute of limitations on those obligations finally settled in 1971 and paid out in May-June of that year has not tolled as of this date in 1977 and the balances (5% to 10%) are inseparable segments of the false claims which were filed during and following the period of violation in 1965 and 1966.

VI. The issues involved in the complaint herein are now before the United States Supreme Court in Docket 76-1505, a copy of which

is enclosed as Attachment A. However, pending the outcome of that petition and an amended complaint in Docket 68c643,[4] a technical statute of limitations deadline may be argued in extremis by the defendants herein, if this complaint was not filed within the six-year statute of limitations for the anniversay dates of the final false claims disbursement. Hence, this complaint at this time. (See last paragraph page 20, attachment A and footnote.)

VII. This is a civil action for a judgement declaring the defendants liable for penalties and for the refund of double the sums paid out to the lines found in violation of Sec. 810 of the Merchant Marine Act 1936 as a consequence of the collateral estoppel effect of this violation on 31 USC 231, and for an order implementing such recovery on behalf of the plaintiff herein and the United States of America.

VIII. Plaintiff alleges that the illegal behavior was in violation of the operating differential subsidy contract signed between the government and the contractors incorporating the wording of Sec. 810, and that the clear provisions of the statute and subsidy contracts, both binding on the defendants, were deceitfully violated when without any overture to the Department of Commerce they

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[4] The U.S. District Court for the District of Columbia is also open as a forum for amended complaint incorporating 31 USC 231 et seq. covering construction differential subsidies paid during the offending period where no residual balances were paid out in 1971. See Attachment B, page 17a.

acted in concert to destroy an unsubsidized American Flag competitor.

IX. That these actions were inimicable to the interests of the United States in that the weight and leverage of subsidy funding was to hurt an American competitor without the knowledge of the contracting agency charged with the responsibility for promoting the welfare of the American Merchant Marine.

X. That, simulataneous with the filing of this complaint, a notice of pendency is being served on the U. S. Attorney for the Eastern District and the Attorney General of the United States. That, because of requirements of 31 USC 232(c), plaintiff Safir is stayed from proceeding with this action during the time reserved to the Government to decide whether to proceed with the prosecution, that he pleads pro se pending prosecution by the Attorney General, or waiver. That, in the event of waiver, plaintiff Safir will engage licensed counsel to proceed as set forth in 31 USC 232(e)(2).

WHEREFORE, Plaintiff Prays:

(1) That all moneys paid out during the period of violation or reasonably allocable thereto for operating differential subsidies, as set forth in the schedule on page 208A of Attachment B annexed hereto, (and which schedule is subject to final adjustment) be refunded to the United States, as they were falsely claimed and illegally paid out.

(2) That, the provisions of Title 31 USC 231 for penalty plus double the amount of false claims finalized by the payments in

May and June of 1971 be assessed on the final audited amounts paid to each in dividual carrier plus the statutory amount for each false voucher submitted.

Respectfully submitted,

/s/ Marshall P. Safir

Marshall P. Safir, Pro Se
41 Flatbush Avenue
Brooklyn, New York 11217
Tel. No.: 212 - 858 - 2700

May 26th, 1977

Marshall P. Safir
41 Flatbush Avenue
Brooklyn, New York 11217

May 26, 1977

Honorable Griffen Bell
Attorney General of the United States
Department of Justice
Washington, D.C. 20530

Dear Sir:

This is to notify you of the pendency of an action filed this day in the Federal District Court for the Eastern District of New York under Title 31USC Sec. 232(b) on behalf of the undersigned and the United States of America against certain subsidized ocean carriers.

Enclosed herewith in accordance with Title 31USC Sec. 232(c) is a copy of the complaint with attachments A and B comprising substantially all of the pertinent evidence and information material to the effective prosecution if this suit. If additional information is needed the undersigned is prepared to cooperate fully.

In accordance with this section of the law, if the United States shall fail, or decline in writing to the court after a period of sixty days after service to enter this suit the undersigned will proceed to engage licensed counsel to prosecute the case on behalf of the United States of America and himself.

Respectfully yours,

/s/ Marshall P. Safir

MPS:rl

Marshall P. Safir

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES ex rel.
MARSHALL P. SAFIR,

Plaintiffs

v.

AMERICAN EXPORT LINES, et al.,

Defendants.

----------x

DECLINATION OF APPEARANCE

Civil Action No. 77 C 1093

The United States of America, by David G. Trager, United States Attorney for the Eastern District of New York, pursuant to the provisions of the False Claims Act, 31 U.S.C. §§231-235, hereby states as follows:

1. This is a qui tam action brought by plaintiff, Marshall P. Safir on behalf of the United States of America, as well as for himself pursuant to 31 U.S.C. §232(B).

2. The United States of America, pursuant to 31 U.S.C. §232(C), hereby declines to enter this action.

3. In commencing this action, plaintiff Safir has provided the Department of Justice with a copy of his Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia, and a copy of the Appendix thereto, which he has stated comprises his disclosure, pursuant to 31 U.S.C. §232(C), of substantially all the pertinent

evidence and information material to the effective prosecution of this suit.

4. Based upon an examination of this material, the United States has concluded that the central issue of plaintiff Safir's allegations in this action is presently being litigated in the United States District Court for the District of Columbia in an action styled Marshall P. Safir, plaintiff v. Juanita M. Kreps, et al., defendants, Civil Action No. 74-1474. See Safir v. Kreps, 551 F.2d 447 (D.C. Cir. 1977), petition for cert. filed, 45 U.S.L.W. 3733 (U.S. May 10, 1977) (No. 76-1505).

Dated: Brooklyn, New York
June 21, 1977

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

By: /s/ Elaine Buck
ELAINE BUCK
Assistant U. S. Attorney

THE SECRETARY OF COMMERCE

Washington, D.C. 20230

ORDER

In the Matter of:

Subsidy Board Docket No. S-243 Investigation of Alleged Violations of Section 810 of the Merchant Marine Act, 1936, as amended.

The petitions of American Export Lines, Inc., Lykes Bros. Steamship Co., Inc., Moore-McCormack Lines, Inc., Bloomfield Steamship Co. and United States Lines for review of the Maritime Subsidy Board's decisions of April 9, 1973 and October 10, 1973 are hereby granted, solely with respect to the mitigating circumstances and appropriate sanctions to be imposed on the trade respondents. In all other respects, the petitions are denied. The petition for review of American President Lines, Ltd., Farrell Lines, Inc., Prudential-Grace Lines, Inc., and Prudential Steamship Company, Inc. is denied.

The record before me fully presents the contentions of the parties without need for further submissions or delay.

The record indicates that the United States Government actively induced the rate reductions here in issue, and received substantial financial benefit from such reductions. The record further suppports the conclusion that, but for the active inducement of federal officials, rates found by the Federal Maritime Commission previously not to have been unreasonably high would not have been reduced to noncompensating levels by respondents.

Order of U.S. District Court,
District of Columbia, Dated October 21, 1975

Civil Action No. 74-1474

MARSHALL P. SAFIR,

Plaintiff,

—v.—

FREDERICK DENT, individually and as Secretary of Commerce,

Defendant,

AMERICAN PRESIDENT LINES, LTD., et al.,

Intervening Defendants.

Order

Plaintiff Marshall P. Safir, having moved for summary judgment, defendant Frederick Dent, and intervening defendants' Trade Lines and Non-Trade Lines having replied to plaintiff's motion and cross-moved for summary judgment, the Court having considered the motions, memoranda of points and authorities of all parties, it is hereby

ORDERED that the plaintiff's motion for summary judgment is denied, that defendant's and intervening defendants' motions for summary judgment are granted and the complaint herein is dismissed with prejudice this 21st day of October, 1975.

.....

Order of Secretary of Commerce
Dated September 9, 1974

Accordingly, having considered the total circumstances surrounding the rate reductions in question, it is my conclusion that recovery from each of the trade respondents in the October 10, 1973 Final Order on Recoveries shall be modified by reducing the total amount of subsidy subject to recovery to $1,126,522.26 to be apportioned in accordance with the table attached hereto.

The adjustment here ordered is made to reflect the effect of the United States Government action, notwithstanding that the trade respondents shared in a greater or lesser individual degree in the improper conduct that has been determined to have occurred as charged in the petition to the Board.

So ORDERED

.....
Secretary of Commerce

Date: September 9, 1974

TABLE

	COMPANIES				
	AEL	Bloomfield	Lykes	Mormac	United States Lines
Total affected operating differential Subsidy paid during relevant period	$203,739.84	$750,551.12	$2,725,587.69	$ 968,091	$11,082,875
Percentage of Military Cargo to Freight Revenues	*23.77%	24.7%	27.99%	53.27%	17.5%
Portion of Operating Differential Subsidy related to Military Cargo	$ 48,428.83	$185,386.13	$ 762,891.99	$515,702.075	$ 1,949,168.53
Reduction of 50% due to Inducement of Government Officials	$ 24,214.43	$ 92,693.07	$ 381,446	$257,702.075	$ 974,584.27
Reduction due to Special Mitigating Circumstances	$ 18,160.82	$ 46,346.54	———	$193,276.76	$ 487,292.14
Amount Subject to Recovery	$ 18,160.82	$ 46,346.54	$ 381,446	$193,276.76	$ 487,292.14

* The Maritime Subsidy Board has advised that the percentage expressing the relationship between total revenues and military cargos should be changed to this figure.

Opinion and Order of the Maritime Subsidy Board, Dated April 16th, 1973

U.S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
MARITIME SUBSIDY BOARD

———

Docket No. S-243

Investigation of Alleged Section 810 Violation

In the matter of the complaint of Sapphire Steamship Lines, Inc. re Alleged Violation by Atlantic and Gulf American Flag Berth Operators (AGAFBO) of Section 810 of the Merchant Marine Act, 1936, as amended.

———

Chairman, Robert J. Blackwell; Member, H. Clayton Cook, Jr.; Alternate Member, James S. Dawson, Jr.

———

Served Upon:

Marshall P. Safir, 41 Flatbush Avenue, Brooklyn, New York 11217 *pro se.*

James N. Jacobi, Esq., Kurrus & Jacobi, 2000 K Street, N. W., Washington, D. C. 20006 for American Export Lines, Inc.

J. Franklin Fort, Esq. and *Richard S. Salzman, Esq.*, Kominers, Fort, Schlefer & Boyer, 1401 K Street, N. W., Washington, D. C. 20005 for Lykes Bros. Steamship Co., Inc. and Moore-McCormack Lines, Incorporated.

John Williams, Esq., Kirlin, Campbell & Keating, 120 Broadway, New York, New York 10005 for United States Lines, Inc.

Opinion and Order of the Maritime Subsidy Board, Dated April 16th, 1973

Amy Scupi, Esq. and *Olga Boikess, Esq.,* Galland, Kharasch, Calkins & Brown, 1054 31st Street, N. W., Washington, D. C. 20007 for Bloomfield Steamship Co.

Robert T. Basseches, Esq., Shea & Gardner, 734 Fifteenth Street, N. W., Washington, D. C. 20005 and *Daniel H. Margolis, Esq.,* and *Murray J. Belman, Esq.,* 21 Dupont Circle, N. W., Washington, D. C. 20036 for American President Lines, Ltd., Prudential-Grace Lines, Inc. and Prudential Steamship Company, Inc.

Verne W. Vance, Esq. and *Andrew J. McElaney, Jr., Esq.,* Foley, Hoag & Eliot, 10 Post Office Square, Boston, Massachusetts 02109 for Farrell Lines, Inc.

Michael J. McMorrow, Esq., Maritime Administration, Washington, D. C. 20235, as Public Counsel.

Docket No. S-243 is an investigative proceeding instituted by the Maritime Subsidy Board (Board) on October 24, 1969 to determine whether Section 810 of the Merchant Marine Act, 1936, as amended (Act),[1] had been violated by conduct of certain carrier members of the Atlantic and Gulf American Flag Berth Operators (AGAFBO) and the appropriate action that should be taken. Named as parties to the proceeding were petitioners Sapphire Steamship Company (Sapphire) and its individual owners, Marshall P. Safir and Arnold Weissberger, who along with others,[2] had petitioned

[1] 46 U.S.C. § 1227 (1970).

[2] These were two service organizations, Pioneer Overseas Services Corporation, a traffic management agency wholly owned by Mr. Safir, and Liberty-Pac International Corporation, a freight forwarder specializing in the overseas transportation of household goods wholly owned by Mr. Weissberger. They were extended the opportunity to file petition for leave to intervene in the proceeding but never made such filing. Of all the petitioners,

Opinion and Order of the Maritime Subsidy Board, Dated April 16th, 1973

CONCLUSION

Based upon the foregoing discussion and findings and after full consideration of the record compiled in this proceeding, including all arguments and presentations by all parties and the Chief Judge's Recommended Decision, we find and conclude that:

1) All respondents violation Section 810 of the Merchant Marine Act, 1936, as amended, and applicable provisions of their ODS contracts by acting in concert to reduce rates on selected military cargo carried in U.S. Atlantic & Gulf to United Kingdom/Bordeaux/Hamburg area and holding such rates at such levels during the period March 29, 1965 to March 1, 1966 (but as to respondent Bloomfield only until and including December 31, 1965) in order to unjustly discriminate and unfairly compete against Sapphire Steamship Company, and

2) In consideration of pertinent mitigating circumstances respondents owe. Subject to documentation by said respondents and Public Counsel, the following for such violations of Section 810:

   (a) Respondents APL, Farrell, Grace and Prudential, who did not compete with Sapphire and whose violations are technical only, no amount;

   (b) Respondent Lykes about $1,130,123 to be accounted for on terms satisfactory to the Government;

   (c) Respondent AEL about $38,036 to be accounted for on terms satisfactory to the Government;

Memorandum Incorporating Finding of Fact and Order, Dated June 6, 1972

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

68 C 643

MARSHALL P. SAFIR,

Plaintiff,

—against—

ANDREW GIBSON, Acting Maritime Administrator, Maritime Administration, U.S. Department of Commerce, et al.,

Defendants.

DOOLING, *D.J.*:

Plaintiff moves for an order requiring the Secretary of Commerce to pay the purchase price of the S.S. UNITED STATES into escrow and to establish an escrow of all amounts payable to the present shipowners upon their sales of the S.S. ARGENTINA, the S.S. BRAZIL, the S.S. SANTA ROSE, the S.S. SANTA PAULA, and the S.S. CONSTITUTION; the amounts referred to are expected to become payable under the provisions of Public Law 92-296 effective May 17, 1972 to United States Lines, Inc. (on the Government's purchase of the S.S. UNITED STATES under the public Law), to Moore-McCormack Lines, Incorporated (on the sale of the S.S. ARGENTINA and the S.S. BRAZIL into foreign ownership, registry, and flag pursuant to the provisions of Public Law 92-296 and subject to its limitations), to American Export Isbrandtsen Lines, Inc. (on the sale of the S.S. CONSTITUTION into foreign ownership, registry, and flag pursuant to the same public Law), and to Prudential-Grace Lines, Inc. under the same Public Law.

It appears that the recommended decision of the Hearing Examiner, rendered April 12, 1972, would require repayments by Moore-McCormack of $759,704, by United States Lines of $3,243,865 and by American Export Lines of $22,373 and that Prudential-Grace would not be required to make any refund payment. The Maritime Subsidy Board of the Maritime Administration has not yet reviewed the recommended decision of the Hearing Examiner. Exceptions have been taken to the Hearing Examiner's report by both sides and the exceptions are still undetermined.

Meanwhile and wholly separately the Congress passed and the President approved Public Law 92-296, effective May 17, 1972. It provides for the disposition of laid-up passenger vessels which had been operated under operating differential subsidy contracts with the United States. The law provides that, except for the vessels INDEPENDENCE and UNITED STATES, the laid-up vessels may be sold and transferred to foreign ownership, registry and flag with the approval of the Secretary of Commerce provided, among other things, that the seller agrees with the Secretary that an amount equal to the net proceeds received from the sale in excess of existing obligations and incidental expenses shall within a year of receipt be committed to and thereafter used as equity capital to build new vessels which the Secretary determines are built to effectuate the purposes and policies of the Merchant Marine Act of 1936 as amended. Section 2 of the same Act authorizes the Secretary to purchase the UNITED STATES at depreciated cost less the unpaid principal and interest on the mortgage on the vessel for lay-up in the National Defense Reserve Fleet.

Plaintiff contends that since the amount ultimately possibly recoverable by the Government from the AGAFBO steamship companies may rise as high as half a billion dol-

lars if the Examiner's recommended decision is not adopted, the amounts of money coming into the hands of the steamship companies under the new legislation should, in effect, be impounded to secure the payments that the steamship companies might be required to make to the United States under the final decision.

The motion must be in all respects denied.

The payments being made are not payments of subsidies in respect of the periods during which the offensive conduct was continued. The only ground on which the motion can be made is that a sort of anticipatory execution should be issued to assure that, if the ultimate decision directs greater refunds of operating differential subsidy than the Examiner recommends, funds to pay the refunds will be at hand. However, there is no reason to frustrate the functioning of the statute involved. The evidence presented does not indicate that the ability of any of the steamship companies to respond will be worsened by carrying out the new statute according to its terms or that any of the steamship companies will be in a position to dissipate the funds. Only in the case of the amounts paid to the United States Lines does it appear that refunds will pass into the unrestricted possession of the steamship company. The evidence shows that United States Lines is abundantly solvent. Similarly the evidence is that Moore-McCormack and American Export Isbrandtsen Lines, Inc. are solvent and will be able to respond to any requirement that they make refunds of subsidy.

No reason appears why the plaintiff should be entitled at this time to relief which is based essentially on the assumption that the Examiner's recommended decision is wrong and that the final decision will order vastly larger

refunds. No such inference can be indulged to support an application for the relief of preliminary injunction. If that inference could be indulged, every other asset and every other pending receipt of any of the steamship companies could with equal plausibility be subjected to a demand that it be placed in escrow or otherwise set aside for execution in the event that large recoveries were ordered by the Subsidy Board. The affidavit of the Assistant Secretary of the Maritime Subsidy Board and the Maritime Administration shows that withheld amounts of operating differential subsidy of the four steamship companies exceed the amounts of the Hearing Examiner's recommended refund except in the case of United States Lines, which according to the official records of the Maritime Administration has a net worth of $74,000,000.

Plaintiff argues that he may have an individual right to participate in any ultimate recovery by the Government under *qui tam* legislation. No statute authorizing a *qui tam* recovery or *qui tam* proceedings has been pointed to and the decision in *Connecticut Action Now, Inc.* v. *Roberts Plating Company, Inc.*, 2d Cir. 1972, Slip Opinion page 2253 makes it reasonably clear that the plaintiff has no *qui tam* interest in the Government's recovery under Section 810 of the Merchant Marine Act, 1936 as amended (46 U.S.C. § 1227).

It is accordingly

ORDERED that the plaintiff's motions brought on by Orders to Show Cause dated May 4 and May 17, 1972, are in all respects denied.

Brooklyn, New York, June 6, 1972.

JOHN F. DOOLING, JR.,
U. S. D. J.

Decision (Per Curiam)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 237—September Term, 1972.

(Argued November 27, 1972 Decided November 29, 1972.)

Docket No. 72-1753

MARSHALL P. SAFIR,

Appellant,

v.

ROBERT J. BLACKWELL, Maritime Administrator, Maritime Administration, U.S. Department of Commerce, et al., MOORE-MCCORMACK LINES, INC., UNITED STATES LINES, INC., AMERICAN EXPORT LINES, INC., and PRUDENTIAL-GRACE LINES, INC.,

Appellees.

Before:

FRIENDLY, *Chief Judge,*

WATERMAN and HAYS, *Circuit Judges.*

Appeal from an order of the District Court for the Eastern District of New York, John F. Dooling, Jr., *Judge,* denying plaintiff's motion for an order requiring the payment into escrow of sums expected to be received by the ship operator defendants on the sale of certain ships.

Affirmed.

Decision (Per Curiam)

PER CURIAM:

In this case, which is now here for the third time, see *Safir* v. *Gibson,* 417 F.2d 972 (2 Cir. 1969); *Safir* v. *Gibson,* 432 F.2d 137 (2 Cir.), *cert. denied,* 400 U.S. 850 (1970), plaintiff Safir moved to require the ship operator defendants to pay into escrow moneys expected to become payable to them in consequence of the sale of certain American flag ships authorized by Public Law 92-296, which became effective May 17, 1972. The motion was based on plaintiff's fear that the defendants might not be financially able to respond to a direction for the repayment of operating differential subsidies which may be made by the Maritime Administration Maritime Subsidy Board in the proceeding, Docket No. S. 243, instituted as a result of our first decision. The Assistant Secretary of the Board and of the Administration submitted an affidavit indicating that the Government entertained no doubt of its ability to recover, by set-off or otherwise, any amounts that might ultimately be found to be repayable. Accepting this conclusion, the district court denied the requested relief.

The judge's order was well within his discretion; he was not bound to accept plaintiff's assertions that the recoveries will run vastly beyond the sums recommended by the Chief Hearing Examiner in respect of three of the four ship operator defendants. We share plaintiff's concern over the time that the Maritime Administration has taken to decide this matter, especially in light of the narrowing of the issues by our 1970 decision. However, we were advised at argument that, at long last, the matter has now been finally submitted, and we expect it to be promptly decided.

Plaintiff complains of a statement by the district judge that he would have no interest in any recovery by the Government. This statement was unnecessary to the deci-

Decision (Per Curiam)

sion and we have no occasion either to approve or to disapprove it.

Affirmed.

MARSHALL P. SAFIR, *Appellant Pro-Se.*

GILBERT S. FLEISCHER, Esq., New York, N.Y., Attorney in Charge, New York Office, Admiralty and Shipping Section, Department of Justice (Harlington Wood, Jr., Esq., Assistant Attorney General, Robert A. Morse, Esq., United States Attorney, of Counsel), *for Appellees Robert J. Blackwell, Maritime Administrator, et al.*

RICHARD S. SALZMAN, Esq., Washington, D.C. (J. Franklin Fort, Esq., Kominers, Fort, Schlefer & Boyer, Washington, D.C., of Counsel), *for Appellee Moore-McCormack Lines, Inc.*

ELMER C. MADDY, Esq., New York, N.Y. (Kirlin, Campbell & Keating, New York, N.Y., of Counsel), *for Appellee United States Lines, Inc.*

JAMES N. JACOBI, Esq., Washington, D.C. (Kurrus and Jacobi, Washington, D.C., of Counsel), *for Appellee American Export Lines, Inc.*

MICHAEL O. FINKELSTEIN, Esq., New York, N.Y. (Barrett, Knapp, Smith, Schapiro & Simon, New York, N.Y., Daniel H. Margolis, Esq., and Bergson, Borkland, Margolis & Adler, Washington, D.C., of Counsel), *for Appellee Prudential-Grace Lines, Inc.*

Memorandum Incorporating Findings of Fact and Order, Dated June 23, 1971

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

MARSHALL P. SAFIR and SAPPHIRE STEAMSHIP LINES, INC., *Plaintiffs,*

—against—

ANDREW GIBSON, Acting Maritime Administrator, Maritime Administration, United States Department of Commerce, JAMES S. DAWSON, JR., Secretary, Maritime Subsidy Board, Maritime Administration, United States Department of Commerce, and MAURICE STANS, Secretary of Commerce of the United States, AMERICAN PRESIDENT LINES, LTD., PRUDENTIAL LINES, INC. and GRACE LINE, INC. (Now operating as "Prudential-Grace Lines, Inc.") and FARRELL LINES, INC., AMERICAN EXPORT ISBRANDTSEN LINES, INC., BLOOMFIELD STEAMSHIP CO., LYKES BROS. STEAMSHIP COMPANY, INC., MOORE MCCORMACK LINES, INC., and UNITED STATES LINES, INC.,

Defendants.

DOOLING, *D.J.*:

Plaintiffs move for an injunction *pendente lite,* against the Maritime Administration's disbursing to the defendant AGAFBO carriers any part of the $80,000,000 appropriated by the Second Supplemental Appropriation Act, 1971, for the fiscal year ended June 30, 1971 (PL 92-18, approved May 26, 1971). Of the $80,000,000 about half, $40,300,000, is appropriated to liquidate, in part, unpaid ship operation subsidies for the calendar year 1968 and earlier years

the payment of which has been delayed by disagreements over the subsidy amounts due the carriers. $43,150,521.94 was disbursed on and between May 27, 1971 and June 11, 1971, when disbursement was arrested pending decision of the present motion, leaving about $36,850,000 undisbursed, but how much of each segment comprises a part of the $40,300,000 is not disclosed, perhaps is not quickly determinable. The entire $40,300,000 appropriated to pay past-accrued but unliquidated subsidies is made up not of basic current-operating differential subsidies, which are generally disbursed as earned more or less currently to the extent of about 90% to 95% of the amount ultimately determined to be due, but with the held-back amounts consisting of balance-amounts due only when finally determined and agreed upon between carrier and Administration. The Secretary of the Maritime Subsidy Board avers without contradiction that of the $43,150,521.94 already disbursed $9,819,000. is the amount paid to the defendant AGAFBO carriers as past-accrued operating subsidies due for the whole of the two calendar years 1965 and 1966 which, together, include the eleven months of the accused rate-reduction. Eleven twenty-fourths of that total is somewhat over $4,500,000. How much of the undisbursed $36,850,000 will become ascribable to past-accrued operating subsidies of the years 1965 and 1966 is not stated. The defendant carriers, it is said, have unpaid vouchers, still unaudited and unauthenticated, lodged with the Board in the aggregate amount of $62,702,765, all of which, if audited and allowed, could, self-evidently, not be paid out of the present appropriation.

The matter is urgent because the availability of the appropriated funds will end at June 30, 1971, and renewal of the appropriation would, it seems, have to await fresh budgetary and Congressional action.

Plaintiffs' central argument is that the present funds are not, within the meaning of the Court's decision, "current subsidy payments" (432 F.2d at 140, col. 2) payment of which ought not be enjoined, but belong to the radically distinguishable class of "payments . . . during the violation" (417 F.2d at 977, 432 F.2d at 140, col. 2), which, adventitiously, are found undisbursed and which, therefore, present afresh the, indeed, related but new question, should the Administration be required to withhold payment of an amount which the Administration may ultimately determine should not be paid because of the command of 46 U.S.C. § 1227, second paragraph ("Section 810")?

Most of the reasons urged for an injunction are not matters that would warrant judicial interference with the Administration's discharge of its responsibilities under the law as spelled out in the earlier decisions of the Court of Appeals, and an injunction could not be granted under the earlier decisions but for a differentiating feature here presented. It may have lurked in earlier determinations, but if so it was not brought forward recognizably.

Plainly enough, the issue here is differentiable from that which the Court determined on the injunction appeal. The dispositive difference is that before any disbursement is made that manifestly raises a substantial question under Section 810 there must be a specific and advertent decision by the Administration to make, to detain pending further review, or to refuse the payment. It is not a payment of past history presenting the question of whether in the light of all the circumstances the Administration should seek to recover money long since paid out and embedded in ship operations. The right to receive subsidy payments for the accused period is now directly in issue between the

Administration and each affected carrier. The issue is whether, apart from the usually controlling earnings standards, etc., and in the light of the Commission's decision under 46 U.S.C. § 814 ("Section 15") and the Congressional command of Section 810, the payment is due and should be made automatically.

There is no distinct evidence that the matter of disbursement has been considered in the light of determining before disbursement the propriety of making a payment entitlement to which depends on the resolution of a policy decision to be made under Section 810. The Board's letter of June 8, 1971, to plaintiff Safir rather indicates the contrary, in part because the plaintiff Safir's peremptory telegram of May 28, 1971, dealt with the whole $80,000,000 and with withholding, as offset, to secure the payment of any recovery that might be directed in proceeding S-243. Yet the Court of Appeals decisions plainly required that no payment be made without a prior advertent and adequate dealing with the policy matters bearing on payability.

Seen in this perspective the duty of the Administration is forthwith to make a decision of record based on stated grounds either to make payment (absolutely or conditionally), to withhold payment pending review, or to refuse payment of so much of the undisbursed $36,849,478.06 appropriated by Public Law 92-18 of May 27, 1971, as represents payments to the defendant carriers in respect of past-accrued operating subsidies for the eleven month period March 31, 1965, to March 1, 1966.

In this analysis, which singles out for immediate rectification the apparent omission of an indispensable stage of judgmatical administrative action, the conventional stan-

dards for granting injunctive relief, viewed as an extraordinary equitable remedy, are largely if not entirely irrelevant.

It is, accordingly,

ORDERED that the defendants Andrew Gibson, Acting Maritime Administrator, Maritime Administration, United States Department of Commerce, James S. Dawson, Jr., Secretary, Maritime Subsidy Board, Maritime Administration, United States Department of Commerce, and Maurice Stans, Secretary of Commerce of the United States, are enjoined from paying to American President Lines, Ltd., Prudential Lines, Inc. and Grace Line, Inc. (Now operating as "Prudential-Grace Lines, Inc.") and Farrell Lines, Inc., American Export Isbrandtsen Lines, Inc., Bloomfield Steamship Co., Lykes Bros. Steamship Company, Inc., Moore McCormack Lines, Inc., and United States Lines, Inc., so much of the undisbursed $36,849,478.06 appropriated by Public Law 92-18 of May 27, 1971, as represents payments to the defendant carriers in respect of past-accrued operating subsidies for the eleven month period March 31, 1965, to March 1, 1966, unless after a decision of record is made by the Maritime Administration on stated grounds to do so notwithstanding the determination of the Federal Maritime Commission of December 12, 1967, in Docket No. 65-13 under 46 U.S.C. §§ 814, 817, and the terms of 46 U.S.C. § 1227, or unless upon the taking of adequate stipulations and security measures for refunding that will assure that the issue whether the amounts should have been disbursed is determinable after payment exactly as if the whole decision-making process preceded the payment; and it is further

Memorandum Incorporating Findings of Fact and Order, Dated June 23, 1971

ORDERED that plaintiff give security in the amount of $5,000 conditioned as required by Rule 65; and it is further

ORDERED that the defendants' application for a stay is denied; and it is further

ORDERED that plaintiff's motion for injunction is in all other respects denied; and it is further

ORDERED that the denial of injunction, as set forth in the preceding decretal paragraph, is stayed until 2:00 P.M. June 24, 1971, and the defendant public officers are directed until then to continue the present voluntary stay of disbursements to the defendant carriers from the appropriated funds.

Brooklyn, New York, June 22, 1971.

JOHN F. DOOLING, JR.,
U. S. D. J.

Opinion of the Court of Appeals on Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 552—September Term, 1969.
(Decided June 18, 1970.)

Docket No. 34355

MARSHALL P. SAFIR, ARNOLD WEISBERGER and SAPPHIRE STEAMSHIP LINES, INC.,
Plaintiffs-Appellants,

—v.—

ANDREW GIBSON, Successor to and Substituted for JAMES W. GULICK, Acting Maritime Administrator, Maritime Administration, United States Department of Commerce, JAMES S. DAWSON, JR., Secretary, Maritime Subsidy Board, Maritime Administration, United States Department of Commerce, and MAURICE STANS, Successor to and Substituted for C. R. SMITH, Secretary of Commerce of the United States,
Defendants-Appellees,

AMERICAN EXPORT ISBRANDTSEN LINES, INC., BLOOMFIELD STEAMSHIP CO.; LYKES BROS. STEAMSHIP COMPANY, INC.; MOORE-MCCORMACK LINES, INC.; UNITED STATES LINES, INC., AMERICAN PRESIDENT LINES, LTD.; PRUDENTIAL STEAMSHIP CO., INC. and PRUDENTIAL GRACE LINES, INC.; and FARRELL LINES, INC.,
Intervenors.

Before:

LUMBARD, *Chief Judge,*

FRIENDLY and FEINBERG, *Circuit Judges.*

On Petitions of Intervenors for Rehearing

PER CURIAM:

In our decision of February 26, 1970, — F.2d —, slip opinions 1697, we directed the district court "to instruct the Maritime Administration not to redetermine the issue whether the AGAFBO carriers' concerted action in reducing their rates to an unreasonably low level and holding them there for eleven months was unjustly discriminatory or unfair to Sapphire." Shortly thereafter, the AGAFBO lines, which, although fully aware of this action, had been sedulously abstaining from participation, see 417 F.2d 972, 976 n. 4 (1969); — F.2d at —, sought leave to intervene for the purpose of seeking a rehearing on that portion of our decision. We granted such leave, received petitions and accompanying briefs, and then called upon counsel for the appellants and appellees to respond.[1]

The argument most strongly pressed by the intervenors is that they had no sufficient incentive and, indeed, no opportunity to appeal the adverse findings of the FMC, see — F.2d at —, slip opinions at 1705. The latter branch of the argument hangs mainly on the fact that the rates found by the FMC to give rise to a violation of § 15 of the Shipping Act had expired and therefore could no longer be disapproved under § 18(b)(5). But § 15 subjects offending lines to a penalty of $1000 per day of violation. Since the FMC's determination would be conclusive in a civil action

[1] We requested counsel for the appellees to obtain the views of the Federal Maritime Commission. The latter, taking no position with respect to other issues, has advised "that its sole concern here, in the context of its responsibilities under the Shipping Act, is to insure that the finality of its determinations is preserved and that its factual findings will not be litigated long after the statutorily prescribed time for judicial review has run and in proceedings to which it is a stranger." This was the precise object of our decision.

for penalties, it was therefore clearly appealable. See *Pacific Far East Lines, Inc.* v. *FMC*, 410 F.2d 257 (D.C. Cir. 1969). In view of the sharp tone of the FMC report and the even sharper one of the separate opinion of two members, the intervenors could hardly have taken lightly the threat of the Government's suing for a penalty; indeed, we are informed that five of them have recently settled their liability by paying $25,000 each. Moreover, while we relied mainly on this point, — F.2d at —, slip opinions at 1705, we did not at all mean to suggest that the AGAFBO lines should not have been aware of the possible effect of the FMC determination in a proceeding under § 810 of the Merchant Marine Act, of whose potentiality they were apprised very shortly after the FMC decision.

The Government makes the point that if appellants wished to have the Maritime Subsidy Board give conclusive effect to the FMC decision, the Board has a procedure enabling them to raise this matter in limine. They could have moved for a summary disposition of the issue by the Hearing Examiner, 46 C.F.R. 201.91, could have requested permission from him to appeal an adverse decision to the full Maritime Administration, 46 C.F.R. 201.93, and if that were granted and the appeal proved unsuccessful, could have sought further review by the Secretary of Commerce, 46 C.F.R. 202.1. Be all this as it may, we were faced with a statement by the district judge, implying that the FMC determination did not have binding effect, — F.2d at —, slip opinions at 1699-1700, and, after two and a half years, we see no point in launching appellants on the wearisome course the Government has plotted when we are clear that the legal issue must be decided in their favor. The short of the matter is that nothing advanced by the intervenors or the Government alters our conclusion that "it would be quite unseemly for the Maritime Administration

to conclude that its sister agency had been wrong in a fully litigated issue the decision of which Congress had confided to it." — F.2d at —, slip opinions at 1705.

Two minor points should be mentioned. Four intervenors, American President Lines, Ltd., Prudential Steamship Co., Inc., Prudential-Grace Lines, Inc., and Farrell Lines, Inc., urge that they were not competing with Sapphire, had no interest in the rates which the FMC condemned and never voted on these. We see no reason for the concern felt by these carriers. We directed only that the issue whether the reduction of the rates was unjustly discriminatory or unfair to Sapphire was not to be relied upon before the Maritime Administration; we said nothing about who was responsible for these and, by a *footnote 2*, emphasized that "Nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carriers' participation in the illegal action . . ." On the other side, the Government is fearful lest "the tenor of the opinion and the rationale underlying it would appear to foreclose the Maritime Subsidy Board from investigating and concluding, contrary to a majority of the FMC, that a wider conspiracy existed." But there was no "majority" finding on the issue of a wider conspiracy, since the four participating members divided two to two. The issue therefore remains open.

The intervenors' petitions for rehearing are denied.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,
ex rel MARSHALL P. SAFIR and
MARSHALL P. SAFIR,

Plaintiffs,

68 Civ. 643
(JFD)

- against -

ROBERT J. BLACKWELL, Assistant Secretary for Maritime Affairs, United States Department of Commerce, Successor to and Substituted for James W. Gulick and Andrew Gibson, formerly Acting Maritime Administrators, James S. Dawson, Secretary, Maritime Subsidy Board, Maritime Administration, United States Department of Commerce, JUANITA KREPS, Secretary of Commerce of the United States, Successor to and Substituded for C.R. Smith and Maurice Stans, former Secretaries of Commerce,

AMENDED COMPLAINT

Defendants,

AMERICAN EXPORT ISBRANDTSEN LINES, INC., AMERICAN PRESIDENT LINES, LTD. LYKES BROS. STEAMSHIP COMPANY, INC., MOORE-McCORMACK LINES, UNITED STATES LINES, INC., FARRELL LINES, INC.,

BLOOMFIELD STEAMSHIP CO., PRUDENTIAL GRACE LINES, INC. and PRUDENTIAL STEAMSHIP CO., INC.,

Carrier Defendants,

----------X

Plaintiffs by their attorneys, for their amended complaint, allege, as follows:

FIRST: This action arises and this Court has jurisdiction by virtue of the following statutes: 46 U.S.C. sec. 1227, (Merchant Marine Act of 1936); 5 U.S.C. sec. 702, 703, 704, 706 (the agency generally); 28 U.S.C. sec. 2201, 2202 (declaratory judgment); 28 U.S.C. sec. 1301 (jurisdiction) and 31 U.S.C. sec. 231, 232, 233, 235 (False Claims Act).

SECOND: At all relevant times, plaintiff, Marshall P. Safir, has resided in the County of Nassau, State of New York and in the Eastern District of New York. Plaintiff is a citizen of the United States and at all relevant times was a stockholder and officer of Sapphire Steamship Lines, Inc., and personal guarantor of certain of its obligations. At all relevant times, Sapphire Steamship Lines, Inc. was a Delaware corporation, having its principal of business in the County of Kings, State of New York and in the Eastern District of New York.

THIRD: Defendant, Robert J. Blackwell, is the Assistant Secretary for Maritime Affairs in the United States Department of Commerce and is the successor to James W. Gulick and Andrew Gibson, former acting Maritime Administrators for the Maritime Administration, United States Department of Commerce. The Maritime Administration has offices at 26 Federal Plaza, New York, New York.

FOURTH: Defendant, James S. Dawson, Jr., was during the relevant period and still is the Secretary of the Maritime Subsidy Board, Maritime Administration, United States Department of Commerce. The Maritime Administration has offices at 26 Federal Plaza, New York, New York.

FIFTH: Defendant, Juanita Kreps, is the Secretary of Commerce of the United States, and is the successor to C.R. Smith, Maurice Stans, Peter Peterson, Frederick Dent, and Elliot Richardson, former Secretaries of Commerce.

SIXTH: Defendants, American Export Isbrandtsen Lines, Inc., American President Lines, Ltd., Bloomfield Steamship Company, Farrell Lines, Inc., Prudential Grace Lines, Inc., Lykes Bros. Steamship Company, Inc., Moore-McCormack Lines, Inc., Prudential Steamship Co., Inc. and United States Lines, Inc. ("the defendant carriers") are contracting American Flag common carriers which at all relevant times herein have received and except for Bloomfield Steamship Company and United States Lines, Inc. are now receiving operating differential subsidies within

the meaning of Section 810 of the Merchant Marine Act of 1936 (46 U.S.C. §1227).

SEVENTH: Atlantic and Gulf American Flag Berth Operators (hereinafter referred to as "AGAFBO") was at all relevant times herein a conference of American Flag Berth Operators organized to negotiate with the Military Sea Transport Service (hereinafter "MSTS") of the United States Department of Defense (hereinafter "DOD"), which has been approved under Section 15 of the Shipping Act of 1916, as amended (46 U.S.C. §814). Each of the defendant carriers was, during the relevant period herein, a member of AGAFBO.

EIGHTH: On May 6, 1965, the Federal Maritime Commission (not to be confused with the Maritime Administration or the Maritime Subsidy Board of the Maritime Administration) instituted an investigation of the practices surrounding the procurement of ocean transportation of United States military cargoes. The Commission named as respondents AGAFBO (Atlantic and Gulf American Flag Berth Operators), TPAFBO (Trans-Pacific American Flag Berth Operators), WCAFBO (West Coast American Flag Berth Operators), their respective member lines and Sapphire Steamship Lines, Inc., Liberty-Pac International Corp., and Pioneer Overseas Service Corp. The Military Sea Transport Service (MSTS), General Services Administration, Household Goods Forwarders Assn. of America, Inc., and Toledo-Lucas County Port Authority intervened. Beginning September 28, 1965, Examiner C.W. Robinson held hearings totaling 61 days in Washington, San Francisco, and New York, and served an initial decision on December 15, 1966. The

Commission heard oral argument on exceptions and replies to exceptions on May 3, 1967.

NINTH: On December 12, 1967, the Federal Maritime Commission filed its decision, Docket No. 65-13, in which it found and concluded as follows concerning the rates of the Atlantic and Gulf American Flag Berth Operators (AGAFBO):

> 1. The rates of AGAFBO, prior to the entry of Sapphire into the trade, and the rates of WCAFBO were not contrary to Section 18(b)(5).
>
> 2. AGAFBO's rates, which were reduced to an admittedly noncompensatory and unreasonable level in an attempt un-fairly to compete with Sapphire, violated Section 15 by knowingly setting rates which were contrary to Section 18(b)(5) and which were detrimental to commerce and contrary to the public interest.

TENTH: The foregoing decision and findings of the Federal Maritime Commission are now final, no timely review having been sought by any of the carriers involved.

ELEVENTH: At all relevant times involved in the findings of the Federal Maritime Commission referred to hereinabove, Sapphire Steamship Lines, Inc. operated as a nonsubsidized common carrier by water exclusively, employing vessles registered under the laws of the United States, on established trade routes from and to United States ports. It was in direct competition with the members of AGAFBO and was harmed by the illegal payment of subsidies to the mem-

bers of AGAFBO who are not entitled to receive them. Subsidies are provided for by 46 U.S.C. §§1171 through 1182 inclusive, and §§1191 through 1204 inclusive, and are referred to as operating-differential subsidies. There are also subsidies referred to as construction differential subsidies, provided for by 46 U.S.C. §§1151 through 1161.

TWELFTH: Section 810 of the Merchant Marine Act (46 U.S.C. §1227) provides as follows:

> "SEC. 1227. AGREEMENTS WITH OTHER CARRIERS FORBIDDEN; WITHHOLDING SUBSIDIES; ACTIONS BY INJURED PERSONS FOR DAMAGES.
>
> It shall be unlawful for any contractor receiving an operating-differential subsidy under Sections 1171-1182 of this title or for any charterer of vessels under Sections 1191-1204 of this title to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

> No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

THIRTEENTH: In accordance with Attachement I hereto, the members of AGAFBO received $227,686.369.33 during the period of violation.

FOURTEENTH: On December 21, 1967, the plaintiffs requested the Maritime Administration to desist from making any further payments of subsidies of any kind and to take appropriate action to recover subsidies which had been paid from March 25, 1965 to members of AGAFBO on the grounds that in the specific instance of the Sapphire findings by the Federal Maritime Commission a violation of Section 15 of the Shipping Act of 1916 could be proven to be a violation of Section 810 of the M.M.A. of 1946 as well.

FIFTEENTH: Although defendants stated that they would take whatever action was deemed appropriate, no action was taken to either request documentary proof of

plaintiff Safir and others filed the original complaint in this Court to compel agency action on the grounds that a violation of the Shipping Act sec. 15 was in the circumstances of the Sapphire case, a violation which required the invocation of sec. 810.

SEVENTEENTH: This Court dismissed the complaint for failure to state a claim on which relief could be granted, and was reversed in Safir v. Gibson 417 F.2d 972. The Court of Appeals held that the construction differential and operating differential subsidy payments subject to recovery were those paid out during a period of eleven months in 1965-1966.

EIGHTEENTH: Immediately following this reversal and remand, the Maritime Administration instituted an investigation posing the question whether sec. 810 had been violated.

NINETEENTH: Dissatisfied with this procedure, plaintiff Safir herein moved this Court once again for injunctive relief, the Court denied stating that the Court of Appeals in Safir v. Gibson supra had not found that a violation of sec. 15 was a violation of sec. 810 in the Sapphire case.

TWENTIETH: On February 26th, 1970, in Safir v. Gibson 432 F.2d 137, the Court of Appeals reversed, holding that collateral estoppel would exist in this case subject only to proof that the AGAFBO Lines were receiving operating differential subsidies at the time of the violation and that the carrier adversely affected was "a citizen of the United States who operates a common carrier by water, exclusively employing

vessels registered under the laws of the United States on any established routes from and to a United States port or ports.

TWENTY-FIRST: The MSB hearing in Docket 243 was reinstituted to give collateral estoppel effect to a finding of violation subject to this proof. And on February 16th, 1971, at a prehearing conference, plaintiff Safir offered to give this proof to the government, and on March 16th, 1971, May 6th, 1971 and June 15th, 1971, gave sworn testimony and documentary evidence to prove that the criteria had been met.

TWENTY-SECOND: On May 6th, 1971, Administrative Law Judge Paul Pfeiffer informed the respondent lines that a prima facie case for a violation of sec. 810 had been made which would call for the recovery of subsidies paid during or allocable to the period of violation.

TWENTY-THIRD: In spite of the above and immediately thereafter, commencing on or about May 27th, 1971 and through June 12th, 1971, the violating carriers submitted vouchers representing the balance amounts of claims for subsidies allocable to the 1965-66 period, and these were paid out until this Court issued an order restraining the Maritime Subsidy Board from such disbursement unless adequate measures were taken to protect the United States. Plaintiff alleges that these carriers well knew these claims were false.

TWENTY-FOURTH: On April 16th, 1973, MSB issued its final decision that all carrier defendants herein had violated sec. 810. It also held it had discretion to

mitigate subsidy recovery. The defendant carriers petitioned the Secretary of Commerce for review and Secretary Dent affirmed the finding of violation against all of them. He further mitigated the penalties, however. Neither decision included a referral to the Department of Justice for prosecution under the False Claims Act.

TWENTY-FIFTH: At all times during S243, and since 1972 in an action to escrow the proceeds of ship sales in this docket 68-C 643, all defendants knew that plaintiff Safir intended to exercise his rights under 31 USC 231 et seq, if the Secretary of Commerce sought recovery in an amount less than demanded in the original complaint herein.

TWENTY-SIXTH: That in the original complaint, plaintiff Safir demanded judgment for the following relief:

> "C. That an order be issued directing the defendants to commence appropriate legal action to recover the subsidy payments heretofore illegally made...".

TWENTY-SEVENTH: That Articles II-30 and II-31 of each operating differential subsidy contract trigger the defaults and termination terms upon the finding of such violation.

TWENTY-EIGHTH: That Article II-30(a) of the operating differential subsidy agreement provides that the operator furnish a bond--"...to be conditioned upon the true and faithful performance of all and singular covenants and agreements of the operator

contained in this agreement, and particularly upon the refund by the operator to the United States of any amount by which payments on account of the operating differential subsidy, including wage subsidy, shall exceed the amount determined to be payable to the operator under the audits being made pursuant to Article II-20 of this agreement...". -- "The amount of such bond, or of United States government securities furnished in lieu thereof shall be adjusted from time to time...". Plaintiff alleges that these securities and deposits are inadequate for the recovery sought herein.

TWENTY-NINTH: That Article II-30(b) states as follows:

> "b) In the event the operator is unable for any reason to furnish either the bond or pledge the securities in accordance with Article II-30(a), the United States shall withhold such subsidy payments as it deems appropriate to secure performance of this agreement and provide protection against overpayments of operating differential subsidy."

Plaintiff alleges that this has not been done.

THIRTIETH: That Article II-31 specifically reserves the government's rights to proceed to recover under the Act (46 USC 1227) and other pertinent statutes. Plaintiff alleges that 31 USC 231 et seq is the pertinent statute in this instance.

THIRTY-FIRST: On various dates commencing in or about March 1965, each of the defendant carriers submitted vouchers for subsidy payments to the Maritime Administration pursuant to operating-differential subsidy agreements between such defendant carriers and the United States.

THIRTY-SECOND: On various dates commencing in or about March 1965, the defendant carriers, other than Bloomfield Steamship Company, submitted vouchers for subsidy payments to the Maritime Administration pursuant to construction-differential subsidy agreements under Title V of the Merchant Marine Act and on vessels acquired under the Merchant Ship Sales Act of 1946, pursuant to Section 704 of the Merchant Marine Act, between the defendant carriers and the United States.

THIRTY-THIRD: Each of the foregoing agreements provided in part substantially as follows:

II-15. Preference and Conference Agreements

* * *

(b) The Operator agrees not to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any

established trade route from and to a United States port or ports.

* * *

II-18. (e) No payment or subsidy of any kind shall be paid to the Operator if it shall violate the provisions of Article II-15(b) of this Agreement.

* * *

II-19. Limitations upon Subsidy Payments. Notwithstanding any other provision of this Agreement, no payment of operating-differential subsidy shall be made with respect to any of the following:

* * *

(c) Expenses incurred while the Operator is for any reason ineligible for the accrual of a subsidy under the Act;

(d) Expenses incurred in connection with a voyage made by any subsidized vessel during any period when such vessel is for any reason not eligible for a subsidy under the Act;

* * *

II-22 Events of Default. The following shall constitute events of default under this Agreement.

(a) Any material misrepresentation wilfully or negligently made by the Operator in connection with this Agree-

ment whether before or after execution hereof and whether made in an application, report, affidavit, or otherwise, or any wilful or negligent failure by the Operator to disclose material information.

(b) The occurrence of any event causing the Operator to be ineligible for an operating-differential subsidy.

THIRTY-FOURTH: Each of the vouchers submitted by the defendant carriers pursuant to such agreements included an affidavit which states in substance as follows:

I, ----------,
(name of company official)
being duly osworn, depose and say, that I am ----------
(title)
of the ---------- (here-
(Operator)
in referred to as the "Operator"), and as such am familiar with (a) provisions of the Operating-Differential Subsidy Agreement, Contract No. ----------, dated as of ---------- as amended, to which the Operator is a party; and (b) the regulations governing the payment of operating-differential subsidy for bulk cargo vessels, Part 252, Title 46, C.F.R.; and (c) the operation of the vessels covered by said Agreement and regulations; and (d) the accounts, books, records, and disbursements of the Operator relating to such operation.

Referring to the public voucher dated ----------, covering voyages terminated during the periods commencing ---------- and ending ---------- and attached submitted by said Operator concurrently herewith for a payment on account in the sum of ---------- -under said Agreement. I further depose and say that, to the best of my knowledge and belief, the Operator has fully complied with the terms and conditions of said Agreement and regulations, applicable orders, rulings and provisions of the Merchant Marine Act, 1936, as amended, and is entitled, under the provisions of said Agreement and regulations, orders and rulings, applicable thereto, to the amount of the payment on account requested.

THIRTY-FIFTH: Each of the foregoing vouchers was false in that each of the defendant carriers well knew that it had not complied with the paragraph designated II-15(b) above in its agreement with the United States, it knew that it was not entitled to any payment or subsidy of any kind, in view of the provisions of II-18(e) of such agreement, and it knew that events of default had occurred under paragraph II-22 of such agreement in that it had made material misrepresentations, had failed to disclose material information and was, in fact, ineligible for subsidy under the express terms of its agreement. Moreover, it well knew that it had violated §810 of the Merchant Marine Act (46 U.S.C. §1227) and,

accordingly, that it was not entitled to receive the subsidy for which it submitted vouchers.

THIRTY-SIXTH: Pursuant to such agreement, each of the defendant carriers was required to submit and, upon information and belief, did submit an annual accounting, including an affidavit by its chief financial officer that it had fully complied with all of the terms and conditions of its agreement in the manner and at the times therein required. Upon information and belief, said defendant carriers well knew that it had not complied with the paragraph of such agreement designated II-15 above.

THIRTY-SEVENTH: The total amount of subsidy payments received by these defendant carriers in response to false vouchers is presently unknown to plaintiff. The total amount of payments paid during the relevant period such defendant carriers were in violation of sec. 810 of the Merchant Marine Act (46 U.S.C. sec. 1227) is as set forth in Attachment I, annexed hereto. The exact amount of subsidy payments attributable to the relevant period is presently unknown to plaintiff.

WHEREFORE, the United States ex rel Marshall P. Safir and Plaintiff Safir demand judgment for the following relief:

A. A judicial declaration adjudicating that all carrier defendants who were found to have violated sec. 810 of the Merchant Marine Act of 1936 during an eleven-month period and who filed claims for payment of both construction and operating subsidies during that period or soon thereafter

violated 31 U.S.C.231 as well by the submission of false vouchers knowing them to be false.

B. A judicial declaration adjudicating that all of the carrier defendants who were found to have violated sec. 810 during an eleven-month period in 1965-66, and who filed final segments of those vouchers for operating differential subsidies in 1971, violated 31 U.S.C.231 as well when the United States paid false claims submitted by the defendant carriers who knew them to be false.

C. That the Secretary of Commerce be ordered to declare the defendant carriers in default of their ODS agreements.

D. That the Secretary forthwith be ordered to protectively attach the capital construction accounts of the violating carriers and all other bonds and sureties as provided in Article II-30 ODSA.

E. That the Secretary be ordered to offset all subsidies accrued but unpaid due the defendant carriers herein.

F. That the Secretary be ordered to withhold all current payments pending the marshalling of funds necessary to make the government whole for the subsidies illegally paid.

G. That judgment be granted in favor of the United States for twice the amount of construction and operating differential subsidy payments received by the defendant carriers, pursuant to false vouchers as aforesaid, plus the statutory amount

of two thousand dollars ($2,000.) for each false voucher, and that plaintiff be awarded costs and disbursements including an allowance pursuant to the provisions of 31 U.S.C. 232 c(2).

And for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ Marshall P. Safir

MARSHALL P. SAFIR,
41 Flatbush Avenue
Brooklyn N. Y. 11027
Tel. No. 858-2700

Dated: September 13th, 1977.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

MARSHALL P. SAFIR,
Plaintiff,

- against -

ROBERT J. BLACKWELL, Assistant Secretary for Maritime Affairs, United States Department of Commerce, Successor to and Substituted for James W. Gulick and Andrew Gibson, formerly Acting Maritime Administrators, James S. Dawson, Secretary, Maritime Subsidy Board, Maritime Administration, United States Department of Commerce, JUANITA KREPS, Secretary of Commerce of the United States, Successor to and Substituted for C.R. Smith and Maurice Stans, former Secretaries of Commerce,

Defendants,

AMERICAN EXPORT ISBRANDTSEN LINES, INC., AMERICAN PRESIDENT LINES, LTD. LYKES BROS. STEAMSHIP COMPANY, INC., MOORE-McCORMACK LINES, UNITED STATES LINES, INC., FARRELL LINES, INC., BLOOMFIELD STEAMSHIP CO., PRUDENTIAL GRACE LINES, INC. and PRUDENTIAL STEAMSHIP CO., INC.,

Carrier Defendants.
----------X

AFFIDAVIT

68 Civ. 643 (JFD)

UNITED STATES OF AMERICA,
ex rel MARSHALL P. SAFIR and
MARSHALL P. SAFIR,
Plaintiffs,

- against - 77 Civ. 1093 (JFD)

AMERICAN EXPORT LINES, INC.,
ET AL.,
Defendants.
----------X

STATE OF NEW YORK)
COUNTY OF KINGS)

MARSHALL P. SAFIR, being duly sworn, deposes and says:

1. On or about June 24, 1968, the first above captioned action was initiated by filing a complaint in this Court. In essence, the action sought to require the responsible officers of the United States Government to discontinue subsidy payments to the following carriers:

American Export Isbrandtsen Lines, Inc.
American President Lines, Ltd.
Bloomfield Steamship Co.
Farrell Lines Incorporated
Prudential Grace Lines, Inc.
Lykes Bros. Steamship Co., Inc.
Moore-McCormack Lines, Inc.
Prudential Steamship Co., Inc.
United States Lines, Inc.

and to recover subsidy payments already made on the ground that such carriers had violated Section 810 of the Merchant

Marine Act (46 U.S.C. Sec. 1227) by engaging in practices in concert which were unjustly discriminatory or unfair to Sapphire Steamship Lines, Inc.

2. At the time I filed the 1968 action, I had not made available to the United States Government, and the United States Government did not have in its possession, all of the evidence and information nec-essary to establish that such carriers had violated Sec. 810 of the Merchant Marine Act. Most significantly, Sapphire Steamship Lines status as a common carrier on established trade routes from and to the United States.

3. Early in 1970, the above carriers intervened in the action I had instituted to seek reconsideration of the decision of the Court of Appeals holding that the Secretary of Commerce was estopped from reconsidering the Federal Maritime Commission's findings of fact in concluding that the carriers had violated Section 15 of the Shipping Act and that the Commission's findings would constitute a violation of Section 810 of the Merchant Marine Act, subject only to proof that the carriers were receiving operating differential subsidies during the relevant time and that plaintiffs were citizens of the United States who could meet certain statutory criteria. Safir v. Gibson, 432 F2d 137 (2d Cir. 1970). They have since participated as defendants in the proceeding. From 1969 on, the defendant carriers have participated as respondents in Maritime subsidy

Board proceedings. They have also participated as intervening defendants in related proceedings in the District of Columbia.

4. On various dates in 1971, in connection with hearings (MSB Docket S-243) before the Maritime Subsidy Board, I made available to the government through Michael J. McMorrow, Esq., of the Federal Maritime Administration, all the information in my files and the files of Sapphire SS Lines; and, as the moving party in the investigation, participated throughout the hearings which took two and onehalf years.

During those hearings, Mr. McMorrow stated "...in the present case, and notwithstanding the inclusion of the requirements of Sec. 810 of the act in each and every subsidy agreement, the respondents did not request contractual permission but proceeded to effect rate reductions and to wage battle before the F.M.C. Once the board was involved, and only through the behest of Mr. Safir, the respondents firmly deny to this date that rate actions are subject to the section. The distinctions are all too apparent. What remains is a clear provision of the subsidy contract and an explicit statute both binding on the respondents as of the day they first began, without any overture to the Maritime Administration, the unlawful behavior." (emphasis added).

5. As a result of my oral and documentary evidence and later participation in oral argument before the Board, the criteria for the finding of a violation as contoured in Safir v. Gibson, 1970 supra was met. On April 16th, 1973, the offending carriers were found to have violated the act by the MSB and this finding was affirmed by the Secretary of Commerce in September 1974.

6. The hearings before the Maritime Administration, therefore, were an outgrowth of the proceedings which I initiated in 1968. Even prior to the commencement of such hearings, I had expended considerable sums in the prosecution of the 1968 action for attorneys' fees and other costs and expenses. Also my own personal resources were seriously depleted by the need to honor various guarantees and other investments and obligations which I had assumed in connection with Sapphire Steamship Lines. Thus, as a direct result of the predatory action by the above named carriers, I was forced to continue this action on behalf of the United States without counsel. In truth, the United States has always been the real party plaintiff in this case. Although the 1968 complaint was not formally amended to allege a cause of action under the False Claims Act (31 U.S.C. 231 et seq.) prior to the time I provided the government with the information necessary for a finding of violation of Sec. 810 of the Merchant Marine Act, I had made

known orally and in writing on numerous occasions to the government and to the offending carriers my contention that, irrespective of any inclination towards leniency on the part of the responsible government officials, I had the right, on behalf of the United States, to enforce its full legal rights under its subsidy contracts with these carriers and that I had the right to remuneration in the nature of a qui tam allowance for my services on behalf of the government. I understand that amendments adding additional claims for damages have uniformly been held to relate back and not to introduce new causes of action (Vann v. United States, 420 F.2d 968 (ct. Cl. 1970); J.L. Simmons Company, Inc. v. United States 412 F.2d 1369 Ct. Cl. 1969); Tabacalera Cubana v. Faber Coe & Gregg, Inc., 379 F. Supp. 772 (S.D.N.Y. 1974); and most significantly United States v. Templeton, 199 F. Supp. 179 (E.D. Tenn. 1961).

7. Indeed, it is only because the government agency, upon information and belief, avoided the normal course of instituting a legal action for breach of the subsidy contracts by adopting the anomalous procedure of holding administrative hearings to decide whether to sue and then settling before suit was instituted that they in effect, avoided the whole issue of whether the carriers filed false vouchers for subsidies.

8. As alleged in the proposed amended complaint, each of the defendant carriers had entered into subsidy contracts with the government prior to its violation of the Merchant Marine in which it expressly agreed (in haec verba with Sec. 810 of the Merchant Marine Act) that it would not

> "engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water, exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports."

Each had expressly agreed that no payment or subsidy of any kind would be made if it violated the above quoted provision. Each voucher which it submitted for a subsidy payment was accompanied by the affidavit of an officer swearing that he was familiar with the terms of the agreement, that the carrier had fully complied with them and was entitled to the payment requested. The subsidy payments to particular carriers during relevant periods were a part of the record before the Maritime Subsidy Board. Thus, the conduct and transactions which were in issue before the Maritime Subsidy Board as a result of

the 1968 complaint and are now res judicata are the same as which form the basis for the proposed amended complaint. The amendment conforms the pleadings to the proof and makes appropriate changes in the complaint to reflect the chronology of events and additional claims for damage under the False Claims Act (31 U.S.C. Sec. 231 et.seq.).

6. On May 26th, 1977, I filed a complaint and affidavit in this Court (77) (Civ. 1093) which asserted a claim against the defendant shippers under the False Claims Act (31 U.S.C. 231 et. seq.). This action was filed to foreclose technical statute of limitations defenses and plaintiff informed the Court that before or soon after the resolution of certain issues related hereto in the Supreme Court of the United States, that this amended complaint would be filed. The proposed amended complaint incorporates this asserted claim. A notice of pendency was accordingly sent to the Attorney General, who in June of this year declined to enter an appearance herein, waiving the government's rights to prosecute under 31 U.S.C. Sec. 232(c).

7. Since common issues of fact and law are involved, the two proceedings should be consolidated.

WHEREFORE, I respectfully request leave to serve the attached amended complaint in the 1968 action and for consolidation of the above proceedings.

/s/ Marshall P. Safir
MARSHALL P. SAFIR

Sworn to before me this
13 day of September, 1977.

Notary Public

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 388

MARSHALL P. SAFIR and SAPPHIRE STEAMSHIP LINES, INC.,
Petitioners,

vs.

ANDREW GIBSON, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY AND SUPPLEMENTAL BRIEF

On September 17, 1970, U. S. District Judge Dooling signed the order and memo to counsel explaining the order, which are set out in the addendum hereto.

The order and memo coupled with the brief of the U. S. Government respondents are ample proof of the judicial and administrative attrition that petitioners will be subjected to if this Court does not now grant certiorari.

After five (5) long years, it is not premature for the Court to grant certiorari. On the contrary, the time is overdue for the authoritative review which only the Supreme Court can provide for this important and meritorious cause.

Our position as set forth on page 14 of the Petition for Certiorari, is fully borne out by the tortuous instructions of an able District Court Judge in trying to implement the first phase of the Mandate of the Second Circuit Court of Appeals.

We respectfully pray that the Petition for Certiorari be granted.

Dated: New York, New York,
September 28, 1970.

Respectfully submitted,

ISADORE B. HURWITZ
Attorney for Petitioners,
1780 Broadway,
New York, New York 10019.
Tel. No. (212) 757-1053

Memo to Counsel

Re: *Safir* v. *Gibson* 68 C 643

The second draft, sent out September 14, has been signed.

The accompanying order does not require that the "considered decision on grounds consistent with the statute" whether or not to seek recovery shall be made by the Maritime Administration wholly internally, and without the making of such record (made on notice and with opportunity to present matter relevant to the decision) as the Administration considers appropriate. It is not intended, either, to mandate a severance on the part of the Administration of its task, as fixed by the decisions of the Court of Appeals, into two distinctly compartmentalized sets of acts, such as, *first*, a process of decision, constituting an exercise of an entirely internal Administration discretion, viewed as an act of Government, about whether or not to seek recovery of subsidies paid during the period of violation, and then, if the decision is to seek recovery, *second*, a distinct process of decision made after an adjudicatory hearing to determine the carriers from whom and the amounts in which such recovery should be sought.

If the Administration's task does involve two aspects or phases of decision making, the order is not intended to prescribe the precise modus operandi in arriving at the final result.

Brooklyn, New York
September 17, 1970.

JOHN F. DOOLING
U. S. D. J.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

ORIGINAL Complaint
68 C 643

The above named plaintiffs, for their complaint against the above named defendants, by their attorney Isadore B. Hurwitz, allege:

First: This action seeks judicial review to compel both agency action being unlawfully withheld and agency action being unlawfully continued, as hereinafter appears. The agency involved is the Secretary of the United States Department of Commerce, the Acting Maritime Administrator, Maritime Administration of the United States Department of Commerce and the Secretary of the Maritime Subsidy Board, Maritime Administration, United States Department of Commerce. This action arises and this Court has jurisdiction by virtue of the following statutes: 46 U. S. C. 1227 (Merchant Marine Act of 1936); 5 U. S. C. 702, 703, 704, 706 (the agencies generally); 28 U. S. C. 2201, 2202 (Declaratory Judgment); 28 U. S. C. 1361 (Jurisdiction); 28 U. S. C. 1337.

Second: Plaintiff Sapphire Steamship Lines, Inc. (an American Flag Carrier referred to as "Sapphire") is a corporation organized and existing under the laws of the State of Delaware, and had its principal place of business at 41 Flatbush Avenue, Brooklyn, New York.

Third: Plaintiff Marshall P. Safir is a natural person residing at 8 Soundview Lane, Great Neck, New York, and is a citizen and taxpayer of the United States and stockholder and officer of Sapphire Steamship Lines, Inc.

Fourth: Arnold Weissberger is a natural person residing at 1764 Bay Boulevard, Atlantic Beach, New York, and is a citizen and taxpayer of the United States and stockholder and officer of Sapphire Steamship Lines, Inc.

Fifth: Defendant James W. Gulick is the Acting Maritime Administrator for the Maritime Administration, United States Department of Commerce. The Maritime Administration has offices at 45 Broadway, New York City.

Sixth: Defendant James S. Dawson, Jr. is the Secretary of the Maritime Subsidiary Board, Maritime Administration, United States Department of Commerce. The Maritime Administration has offices at 45 Broadway, New York City.

Seventh: Defendant C. R. Smith is the Secretary of Commerce of the United States ("The Secretary").

Eighth: American Export Isbrandtsen Lines, Inc., American President Lines, Ltd., Bloomfield Steamship Company, Farrell Lines Incorporated, Grace Line, Inc., Lykes Bros. Steamship Co., Inc., Moore-McCormack Lines, Inc., Prudential Steamship Corporation, and United States Lines Company are contracting American Flag common carriers which at all relevant times herein have received and are now receiving operating differential subsidies within the meaning of 46 U. S. C. 1227.

Ninth: Atlantic & Gulf American Flag Berth Operators (hereinafter referred to as "AGAFBO"), is a conference

of American Flag Berth Operators organized to negotiate with the Military Sea Transport Service (hereinafter "MSTS") of the United States Department of Defense (hereinafter "DOD") which has been approved under Section 15 of the Shipping Act, 1916 (46 U. S. C. Section 814). Each of the common carriers listed in paragraph Eighth above was, during the relevant period herein, a member of AGAFBO.

Tenth: On May 6, 1965 the Federal Maritime Commission (not to be confused with the Maritime Administration or the Maritime Subsidy Board of the Maritime Administration) on its own motion instituted an investigation of the practices surrounding the procurement of ocean transportation of United States military cargoes. The Commission named as respondents AGAFBO (Atlantic and Gulf American-Flag Berth Operators), TPAFBO (Trans-Pacific American-Flag Berth Operators), WCAFBO (West Coast American-Flag Berth Operators), their respective member lines and Sapphire Steamship Lines, Inc., Liberty-Pac International Corp., and Pioneer Overseas Service Corp. The Military Sea Transportation Service (MSTS), General Services Administration, Household Goods Forwarders Assn. of America, Inc., and Toledo-Lucas County Port Authority intervened. Beginning September 28, 1965, Examiner C. W. Robinson held hearings totaling 61 days in Washington, San Francisco, and New York and served an initial decision on December 15, 1966. The Commission heard oral argument on exceptions and replies to exceptions on May 3, 1967.

Eleventh: On December 12, 1967 the Federal Maritime Commission filed its decision, Docket No. 65-13, in which

it found and concluded as follows concerning the rates of the Atlantic and Gulf American-Flag Berth Operators (AGAFBO):

> 1. The rates of AGAFBO, prior to the entry of Sapphire into the trade, and the rates of WCAFBO were not contrary to section 18(b)(5).
>
> 2. AGAFBO's rates, which were reduced to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire were so unreasonably low as to be detrimental to the commerce of the United States contrary to the provisions of section 18(b)(5).
>
> 3. AGAFBO, by reducing its rates to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire, violated section 15 by knowingly setting rates which were contrary to section 18(b)(5) and which were detrimental to commerce and contrary to the public interest.

Twelfth: The foregoing decision and findings of the Federal Maritime Commission are now final, no timely review having been sought by any of the carriers involved.

Thirteenth: That at all relevant times involved in the findings of the Federal Maritime Commission referred to hereinabove, Sapphire Steamship Lines, Inc. operated as a nonsubsidized common carrier by water exclusively, employing vessels registered under the laws of the United States, on established trade routes from and to United States ports. It was in direct competition with the members of AGAFBO and was harmed by the illegal payment of subsidies to the members of AGAFBO who are not

entitled to receive them. Subsidies are provided for by 46 U. S. C. 1171 through 1182 inclusive and 1191 through 1204 inclusive, and are referred to as operating differential subsidies. There are also subsidies referred to as construction differential subsidies, provided for by 46 U. S. C. 1151 through 1161.

Fourteenth: 46 U. S. C. 1227 provides as follows:

> "Sec. 1227. Agreements With Other Carriers Forbidden; Withholding Subsidies; Actions by Injured Persons for Damages.
>
> It shall be unlawful for any contractor receiving an operating-differential subsidy under sections 1171-1182 of this title or for any charterer of vessels under sections 1191-1204 of this title to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.
>
> No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect

to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Fifteenth: Upon information and belief, the members of AGAFBO have received subsidies of both kinds, totaling in excess of $600 million and are continuing to receive subsidies in violation of the statute, 46 U. S. C. 1227.

Sixteenth: On December 21, 1967 the plaintiffs requested the defendants to desist from making further payments of subsidies of any kind and to take appropriate action to recover subsidies which had been paid from March 25, 1965 to members of AGAFBO.

Seventeenth: Upon information and belief, that although the defendants stated they would take whatever action was deemed appropriate, no action whatever has been taken either to recover whatever subsidies had already been paid or to refrain from continuing to make further subsidy payments.

Eighteenth: The action and lack of action of the Secretary of the United States Department of Commerce is implemented by defendants James W. Gulick and James S. Dawson, Jr. in their official capacities. These actions and implementations thereof are agency actions subject to judicial review and appropriate judicial declaration and relief.

WHEREFORE, plaintiffs demand judgment for the following relief:

A. A judicial declaration adjudicating that the making of any subsidy payment of any kind out of the funds of

the United States to the carriers who were members of AGAFBO during the time period covered by the decision of the Maritime Commission Docket No. 65-13, is illegal in violation of 46 U. S. C. 1227;

B. That an order of prohibition be issued prohibiting and enjoining the defendants from continuing to make such subsidy payments;

C. That an order be issued directing the defendants to commence appropriate legal action to recover the subsidy payments heretofore illegally made;

D. That plaintiffs have such other and further relief as may be just and appropriate, together with the costs and disbursements of the action.

ISADORE B. HURWITZ
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

----------X

MARSHALL P. SAFIR,

Plaintiff,

- vs -

JUANITA M. KREPS,
Individually and as Secretary
of Commerce, et al.,

Defendants.

----------X

Civil Action
No. 74-1474
74-1788
75-0077

NOTICE
OF MOTION

PLEASE TAKE NOTICE that in accordance with the order of Magistrate Honorable Jean Dwyer of this Court January 18, 1978, plaintiff Marshall P. Safir has filed a Motion for Further Discovery based on the information contained in the deposition of September 27, 1977 in New York City (Att. A) answerable 15 days from the date of this filing.

WHEREAS,

1. Plaintiff Safir has submitted an affidavit hereto showing cause for further discovery in the "unexplained inconsistencies" of the Secretary of Commerce's decision in Docket S243;

2. Plaintiff Safir's aforementioned deposition attached hereto as Attachement A would provide a basis for further discovery relevant to conspiracy to unduly influence the decision making process and to delay same.

3. And where this undue influence may have contributed to the fraudulent concealment of a violation of the False Claims Act 31 U.S.C. 231, 232, 235.

4. And were evidence relating to such conduct can reasonably be deduced to be contained in certain specific presidential conversations.

5. And where the procedure for such access to the presidential tapes has been advanced by this Court in an earlier case Dellums vs. Powell, 561 F. 2d 242 (1977) to adequately protect privacy, plaintiff moves this Court for a subpoena duces tecum to the office of the General Services Administrator, and for the appointment of an archivist by the Court to review all relevant tapes produced by this subpoena in connection with the discussions held and actions taken in regard to the Safir case from January 3, 1969 to the day the ex-President resigned.

WHEREFORE, plaintiff prays that this motion be granted and for such other relief the Court may deem appropriate to further these objectives.

RESPECTFULLY SUBMITTED,

/s/ Marshall P. Safir

February 15, 1978

Marshall P. Safir
41 Flatbush Avenue
Brooklyn, New York
Tel. No. (212)858-2700

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

----------X

MARSHALL P. SAFIR,

Plaintiff,

- vs -

JUANITA M. KREPS, Individually and as Secretary of Commerce, et al.,

Defendants.

Civil Action No. 74-1474
74-1788
75-0077

AFFIDAVIT AND MOTION FOR SUBPOENA OF PRESIDENTIAL TAPE RECORDINGS

----------X

STATE OF NEW YORK)
SS:
COUNTY OF KINGS)

MARSHALL P. SAFIR, being duly sworn, deposes and says:

On January 18, 1978 at the hearing before the Honorable Jean Dwyer, Magistrate of the Federal District Court of the District of Columbia Circuit, this affiant placed on the record a summary of a deposition he gave on September 27, 1977 in New York City and excerpts of a hearing before Judge John F. Dooling, Jr. of the Eastern District of New York on October 28, 1977. This material related to a corrupt arrangement entered into by the ex-President, Richard Nixon

with the defendant carriers in Docket 74-1474 to thwart this plaintiff in pursuing recovery for the United States of subsidies illegally paid out during the period of a violation of Sec. 810 of the Merchant Marine Act 1936 and the anti-trust case of Sapphire Steamship Lines against AGAFBO. This case was ultimately settled for a sum of $2,400,00.00 as a result of the actions of the firm of Winthrop, Stimpson, Putnam and Roberts acting in behalf of a creditor and who had been the spearhead of objection to a $1,600,000.00 offer of the AGAFBO group. Joseph Alioto, Esq. was anti-trust counsel for Sapphire Steamship Lines at that time and his efforts to arrange the settlement at the lower figure was the subject matter of a decision in the Second Circuit in the matter of Sapphire Steamship Lines and J. Reed Smith vs. Winthrop, Stimpson, Putnam and Roberts cited as 509 F2D 242 Att C Mr. Alioto is now Chairman Of The Board of a Pacific Far East Lines, Inc. an American Flag ocean carrier who has in recent weeks filed for protection under Chapter 11 of the bankruptcy laws.

In the deposition attached hereto the disclosures set forth a sum of $7,000.000.00 that was to be set aside to cover the objectives of Mr. Nixon and this group. The final settlement of the anti-trust case at the figure of $2,400,000.00 would then have left available the sum of $4,600,000.00.

Coincidentally and as a subject for further discovery under the motion which this affidavit supports, the purchase of 49 plus percent of the stock of Pacific Far East Lines by Mr. Alioto in 1974 was, upon information and belief, based on his personal guarantee of a note in the amount of $4,600,000.00 for the stock interest. At the hearing of January 18, 1977 this affiant referred to the availability of the Nixon tape recordings for civil actions based on the decision of Judge William Bryant in the case entitled "In re subpoena to compel disclosure of recorded presidential conversations" later affirmed as Dellums, et al. vs. Powell, et al., 561 F. 2d 242 (1977) Cert. Denied 98 SCR 234.

It was in this landmark decision by Chief Judge Bryant that affiant finds the support necessary to facilitate the mandate of the Court of Appeals decision in Safir vs. Kreps, D.C. Cir. 1977, 551 F. 2d 447.

It will be recalled that the Maritime Subsidy Board found that all the carrier defendants had violated Sec. 810 of the Merchant Marine Act of 1936, a finding that was the basis of this affiant's contentions in 1972 that a violation of Sec. 810 was ineluctably a violation of 31 U.S.C. 231, 232 the False Claims Act, and as stated by Judge Wright in his opinion on this remand:

> "When these detailed and plausible findings of the Board are compared to the peremptory announcement by the Secretary that the record indicates that the United States Government actively induced the rate reductions here at issue."
>
> "The conclusion is virtually compelled that the Secretary has simply failed to come to grips with the difficulty of the evidence in the record, etc."

There was a method to this rationale by the Secretary. His unsupported charge that Federal officials in the Department of Defense induced the illegal action against Sapphire Steamship Lines was an attempt to cloak the violators with immunity under a crudely contrived estoppal against a government initiated action under 31 U.S.C. 23k, 232, 235. He implicated government officials to create this estoppel (using members of a previous administration). His effort did indeed deter the Justice Department from its duty to prosecute the violators under the False Claims Act using as justification the spurious estoppel and the ongoing need to defend the Secretary of Commerce in this action in 74-1474. Affiant further submits that, as in the cases which are now on appeal in the Second Circuit of the Court of Appeals in Docket 77-6219 and 77-7626, the attempt by the Nixon administration via estoppel and non-statutory adjudication

and prior settlement to fraudulently conceal the False Claims Act violation, was the real reason for the "unexplained inconsistency" of the Secretary's actions which brought forth the critical response from Judge Wright. This fraudulent concealment must now be explored here. A full understanding of the action of several government officials including but not limited to former Secretary of Commerce Frederick Dent cannot be achieved without disclosure of specific conversations which were held between the ex-President and several individuals both in government and private sector during his White House years. The mandate of the Court of Appeals can no longer be based on a review of the records alone - the subpoena for the relevant presidential tapes is necessary.

As stated by Judge Leventhal in his opinion in Dellums vs. Powell, supra:

> "There was also a strong constitutional value in the need for disclosure in order to provide the kind of enforcement of constitutional rights that is presented by a civil action for damages at least where as here, the action is tantamount to a charge of civil conspiracy among high officers of government to deny (a class of) citizens their constitutional rights and where there has been sufficient evidentiary substantiation to avoid the inference that the demand reflects mere harassment." 561 F.2d at 247.

In this action where the standing of this plaintiff is no longer questioned there can be no bar to acess to these tapes.

If the allegations are true the ex-President would be subject to demand by the United States for judgment in the amount of the bribes, kickbacks, secret emoluments and other illegal payments allegedly made to him in connection with the Safir case either for protection against subsidy withdrawal, or subsidy recovery, or for the low anti-trust settlement.

As quoted in United States vs. Jankowitz, 553, F. 2d 538 Ct.Cl. (1976) at 547, a false claims action against a government official:

> "The counterclaim (in this case by the government) states a legally sufficient common law right of action recognized by the Supreme Court long ago 'the larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain the acquirement of an interest in conflict with his fidelity as an agent. If he takes any gift, gratuity or benefit in violation of his duties, or acquires any interest adverse to his principal without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received"

(United States vs. Carter, 217 U.S. 286, 306, 30 S.Ct. 515, 520,54 L. Ed. 769, 775 (1910).

Upon the grant of the motion to pursue discovery by the issuance of a subpoena for the Nixon tapes in this action this affiant will move this Court under Rule 15(c) of the Federal Rules of Civil Procedure for leave to amend the original complaint in 74-1474 with a new cause of action under the False Claims Act against Richard Nixon as a means of recovery of a sum approximating the amount of secret emoluments received by him in connection with this alleged fraud and conspiracy.

The 6 year statute of limitations is not a bar to the proper filing of the action as the amendment and the Notice of Pendency to the Attorney General will have been filed within 6 years of plaintiff's discovery of this fraud in 1973 (see the Safir deposition, also cf Holmberg vs. Armbrecht, 327 U.S. 392 et seq.) To the extent that Richard Nixon received salary and other benefits while allegedly betraying his trust, and where a private citizen brings an action under the False Claims Act alleging under the relevant parts of the revised statutes Sec. 3490 and 5438 as to the civil liability of the government officer, to the extent of those monies claimed from the public fisc in his behalf, he is liable for such recovery at $2,000.00 per claim and double damages for each

government voucher he endorsed and presented to his bank for payment. Affiant submits that in the Safir case the ex-President may have entered into a conspiracy to defraud the government of the United States by "aiding to obtain a payment or allowance of any false or fraudulent claim" the actual wording in the revised statutes.

By the questions raised in the Court of Appeals decision in the remand of this case and by the disclosures in the Safir deposition and in the Safir statements made in the hearing before Judge Dooling in the Eastern District on October 28, 1977 and attached hereto and on the fact that these allegations are not denied, that a strong showing can be made for discovery of specific tapes wherein discussions relating to the Safir case may have taken place. The discussion of the potential for discovery in Dellums vs. Powell, supra, pages 248, 249, closely parallels the requirements here and the need for an archivist to act as special master in accordance with the procedure suggested by the Court of Appeals in that case would be acceptable. The tapes in the possession of the General Services Administration are essential to a speedy evaluation of the alleged conspiracy. The motion for the subpoena of a selected list of presidential conversations (which it is reasonable to assume to have taken place) and the appointment of a special master to

protect the privacy of the ex-President in matters that are not relevant to this alleged conspiracy should be granted.

Sworn to before me this 15th day of February, 1978

/s/ Marshall P. Safir
Marshall P. Safir

U. S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
Washington, D.C. 20235

May 20, 1970

Allan I. Mendelsohn, Esq.
Glassie, Pewett, Beebe & Shanks
Federal Bar Building West
1819 H Street, N. W.
Washington, D. C. 20006

Dear Mr. Mendelsohn:

Reference is made to your letter of May 4, 1970, requesting certain information respecting subsidy payments during the period March 30, 1965 through February 28, 1966, made to nine (9) specified shipping companies.

Please find attached (Attachment I) which furnishes the information requested in sub-paragraph (1) of your letter and Attachment II, which is responsive to sub-paragraph (2) of your letter.

In keeping with established User Fees, you are respectfully requested to submit a check in the amount of $50.00, made payable to "Maritime Adm.-Commerce", to the undersigned to compensate for time spent in compiling the attached tabulations.

Sincerely,

JAMES S. DAWSON, JR.
Secretary

Attachments

Attachment I

DEPARTMENT OF COMMERCE—MARITIME ADMINISTRATION
CASH SUBSIDY PAYMENTS MADE TO SELECTED SHIPPING COMPANIES
IN THE PERIOD MARCH 30, 1965 THROUGH FEBRUARY 28, 1966

Name of Company	*Operating-Differential Subsidies*	*Construction-Differential Subsidies*	*Total Subsidies Paid*
American Export Isbrandtsen Lines, Inc.	$ 29,044,028.74	$ 344,685.73	$ 29,388,714.47
American President Lines, Ltd.	25,281,292.09	14,764,741.49	40,046,033.58
Bloomfield Steamship Company	1,384,187.53	—0—	1,384,187.53
Farrell Lines Incorporated	6,428,221.13	—0—	6,428,221.13
Grace Line, Inc.	17,213,156.03	20,120,297.83	37,333,453.86
Lykes Bros. Steamship Co., Inc.	20,017,353.25	25,702,958.78	45,720,312.03
Moore-McCormack Lines, Inc.	21,236,087.68	1,616,758.09	22,852,845.77
Prudential Lines, Inc.	2,161,538.61	7,533,671.67	9,695,210.28
United States Lines, Inc.	26,844,437.62	7,992,953.06	34,837,390.68
Totals	$149,610,302.68	$78,076,066.65	$227,686,369.33

Merchant Marine Act, 1936, 46 U.S.C. 1227

It shall be unlawful for any contractor receiving an operating- differential subsidy under sections 1171-1182 of this title or for any charterer of vessels under sections 1191-1204 of this title to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

False Claims Act - 31 U.S.C. 232

§ 232. Same; suits; procedure

(A) The several district courts of the United States, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall whereso-ever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.

(B) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States, the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the United States attorney, first filed in the case, setting forth their reasons for such consent.

(C) Whenever any such suit shall be brought by any person under clause (B) of this section notice of the pendency of such suit shall be given to the United States by serving upon the United States attorney for the district in which such suit shall have been brought a copy of the bill of complaint and by sending, by registered mail, to the Attorney General of the United States at Washington, District of Columbia, a copy of such bill

together with a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit. The United States shall have sixty days, after service as above provided, within which to enter appearance in such suit. If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit: Provided, That if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance with clause (B) of this section. The court shall have no jurisdiction to proceed with any such suit brought under clause (B) of this section or pending suit brought under this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: Provided, however, That no abatement

shall be had as to a suit pending on December 23, 1943, if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in possession of the Department of Justice.

§ 233. Duty of United States attorney as to such cases

It shall be the duty of the several United States attorneys for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section 231 of this title by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of $2,000, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit. R.S. § 3492; June 25, 1948, c. 646 § 1, 62 Stat. 909.

§ 235. Limitation of suit

Every such suit shall be commenced within six years from the commission of the act, and not afterward. R.S. § 3494.

see

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